

Indiana Law Review



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2004 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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JURY TRIALS AREN'T WHAT THEY USED TO BE

RANDALL T. SHEPARD*

The American jury has been the subject of both great praise and great disdain. Two of the most recognizable and important commentators on American society offered competing assessments. Alexis de Tocqueville created a substantial list of the benefits juries provide to American society concluding with his belief that “the jury, which is the most energetic form of popular rule, is also the most effective means of teaching the people how to rule.”¹ On the other hand, Mark Twain once wrote, “[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury.”²

I leave it to the reader to make up his or her own mind about the current quality of the jury. My own view is that modern jury system, although successful in reaching the right result, is structured in ways that sometimes make that goal difficult to reach.³ I want to describe here how ongoing reforms in Indiana are improving the system and reshaping it to better reflect de Tocqueville’s idealized vision.

Beginning with the adoption of new Indiana Jury Rules in 2001, the supreme court has attempted to introduce reforms that we believe will improve the public’s respect for the jury and increase its effectiveness as a tool of justice. Jury reform is an ongoing process in this state, and just this year we adopted a substantial amendment permitting juror discussions prior to deliberations. While this article affords an opportunity to introduce the newest amendments to the jury rules, I also wish to describe some of those improvements we have made over the last several years, and some of the reforms we hope to introduce in the future.

I. JURIES THEN AND NOW

One can best understand the reforms we have put in place by reference to the context in which the reforms occurred. This necessitates saying a little bit about the historic role of the jury, its importance to democracy in America, and its tragic fall from grace in the eyes of the public.

The American jury’s place on any short list of the most ancient among our bequest from older western societies is beyond peradventure. Scholars and jurists have frequently extended its roots as far back as ancient Greece. During the height of Athenian power, for example, the members of the city-state not only created what were essentially jury pools, but employed large panels of citizens as judges of law and fact during trials.⁴

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1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318 (Arthur Goldhammer, trans., Library 2004) (1835).

2. MARK TWAIN, *ROUGHING IT* (1872), *reprinted in* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 222 (Fred R. Shapiro ed., 1993).

3. *See* STEPHEN BATES, *THE AMERICAN JURY SYSTEM*, CANTIGNY CONFERENCE SERIES SPECIAL REPORT 9 (2000).

4. 1 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 2 n.3 (1959).

While the roots of the jury do indeed grow deep, an Indiana jury trial would hardly be complete without someone telling the venireman that it was the legal tradition developed in England following the Norman Conquest in 1066, from which the American jury system most directly draws its heritage. Emerging from earlier Frankish legal traditions, juries and jury trials, although fairly unrecognizable to modern eyes, had become common in England by the end of the twelfth century.⁵ Only about 300 year later, in the middle of the fifteenth century, the English jury trial had come to possess a basic form that we would recognize today.⁶

That basic form, and the further refinements made over the course of the intervening years, accompanied the early English colonists to the North American continent and integrated into the colonial governments.⁷ Despite wide variations in its application, by the start of the Revolutionary War, jury trials in both civil and criminal cases had become an important right to citizens throughout the colonies.⁸ Indeed, among the numerous and weighty grievances against King George III listed in the Declaration of Independence was the complaint that he “deprive[ed] us, in many cases, of the Benefits of Trial by Jury.”⁹

Having won the war for independence, the Founders sought to protect the fruits of their labor, among other things, the right to a jury trial. To that end, they enshrined the right to jury trial in the Constitution, affirming the right in both the Sixth and Seventh Amendments.¹⁰ Indiana, like the national government and each of the other forty-nine states, similarly preserved and protected the right to trial by jury in its state constitution. In fact, Indiana’s 1851 Constitution is nearly unique among state constitutions in that it goes beyond preserving the right to jury in civil and criminal cases, by declaring that the jurors shall be the judges of both law and fact.¹¹

Today, the jury continues to exist and serve the interests of justice. The percentage of all cases being resolved by reference to juries has been in a state

5. *Id.* § 10. See also sections 3 to 15 for a brief history of the development of the jury trial.

6. *Id.* § 12.

7. *Id.* § 16.

8. *Id.*

9. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

10. The importance the Founders placed on preserving the jury trial as a constitutional right was perhaps best explained by Justice Sandra Day O’Connor who once pointed out that “the federalists and anti-federalists, who could agree on little, agreed on the importance of preserving trial by jury.” Sandra Day O’Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. LAW., June 1997, at 20, 22.

11. IND. CONST. art. I, § 19 (1851). Indiana is one of only three states that makes the jury the judge of law and facts in criminal trials. 2 CITIZENS COMM’N FOR THE FUTURE OF IND. COURTS & THE JUDICIAL ADMIN. COMM. OF THE IND. JUDICIAL CONFERENCE, JURIES FOR THE 21ST CENTURY 3 (2000). My colleague Justice Rucker has provided a splendid examination of the heritage and meaning of this provision. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999).

of long-term decline, raising important questions about the nature of the rule of law in our country. Still, last year over 2000 jury trials were conducted in Indiana, and thousands of Hoosiers fulfilled their civic duty by serving on panels.¹²

Despite the long and distinguished pedigree of the jury, and its continued importance to the justice system, the jury trial has fallen on hard times both in Indiana and across the country. Research suggests that there are many problems with the present system. Jurors frequently complain of poor treatment at the hands of court officials, the inconvenience of jury service, fear over their role as jurors, and anxiety because they are uncertain about the trial process.¹³ Moreover, many in the public tend to view the jury as archaic, emotional, irrational, and unintelligent.¹⁴ Indeed, the jury system has long been a fertile source of material for comedians and satirists.¹⁵

Despite the ongoing flow of slams against the jury, the system is hardly doomed. Although there are many complaints about the mechanics of the jury process, one of the most promising signs of the health of the system is that there remains a broad conviction that the jury system is a positive and necessary force in the quest for justice.¹⁶ There is thus every reason to believe that by reforming

12. The supreme court's Division of State Court Administration has not yet released statistics for 2004, but they estimate that about 2176 occurred. The statistics for 2003 show that 2022 jury trials were conducted. DIV. OF STATE COURT ADMIN., SUPREME COURT OF INDIANA, VOL. I, 2003 INDIANA JUDICIAL REPORT 81 (2003).

13. BATES, *supra* note 3, at 13-14. Representative comments regarding juror's experiences with jury duty can be found in Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 706-07 (2000).

14. 2 CITIZENS COMM'N, *supra* note 11, at 6-7.

15. Mark Twain's biting sarcasm is only the tip of the iceberg when it comes to popular entertainers poking fun at the ineffectiveness and lack of intelligence of the jury. Popular comedian Norm Crosby once quipped that "when you go into court you are putting your fate into the hands of twelve people who weren't smart enough to get out of jury duty."

Even the modern popular television show *The Simpsons* has taken its jabs at America's attitude towards juries and jury duty. The lovable buffoon Homer has been seen on a jury, confirming for us the public perception that juries are made up of those too stupid to avoid service. *The Simpsons: The Boy Who Knew Too Much* (Fox television broadcast, May 5, 1995). In another episode the show writers acknowledged America's antipathy towards jury service, when the city of Springfield issued new, more enticing summons informing the recipient that they "[h]ave been chosen to join the Justice Squadron, 8 A.M. Monday at the Municipal Fortress of Vengeance." *The Simpsons: They Saved Lisa's Brain* (Fox television broadcast, May 9, 1999).

It would be a great deal easier to bring about jury reform if the problems facing real juries were so easy to correct. Alas, television is not real life, and we must, unfortunately, take more meaningful and less humorous steps to confront the negative public perception of jury service if we are to preserve that important institution. The humor, however, helps make the bitter pill less difficult to swallow.

16. Susan Carol Losh et al., "Reluctant Jurors" *What Summons Responses Reveal About Jury Duty Attitudes*, 83 JUDICATURE 304, 306 (2000).

and improving the mechanics of the jury trial, the system can flourish in the twenty-first century.

II. THE ISSUANCE OF JURY RULES IN 2001 PROVIDED A HOST OF CHANGES

The reforms instituted in Indiana's jury system are the product of the long and careful investigation by numerous individuals and organizations dedicated to ensuring the success of the Hoosier jury. Chief among these reformers were the late Sara B. Davies of Evansville, Chair of Citizens Commission for the Future of Indiana Courts, and former judge Ernest B. Yelton, chair of the Judicial Administration Committee for the Judicial Conference of Indiana. Indiana's reforms cannot, however, be viewed in a vacuum. The impetus for the recent round of jury reforms began not here in Indiana, but in Arizona in 1993 when the Arizona Supreme Court appointed a committee to review the entire jury system and develop responses to the perceived inadequacy of the existing arrangements.¹⁷ The trend that began in Arizona spread to New York, California, and Colorado, all of which assembled committees to examine those states' jury systems as well.¹⁸

In 1997, following the groundbreaking work in those states but still entering unfamiliar waters, the members of our Judicial Administration Committee began working on ways to reform the Hoosier jury.¹⁹ That effort ran along a parallel project by the freestanding Citizens Commission. In 2000 those two organizations recommended a variety of reform measures to juries in Indiana as part of their combined report "Juries for the 21st Century."²⁰ In 2001, the Supreme Court adopted for the first time a set of statewide jury rules, which incorporated most of the recommendations contained in the report.²¹

Before separate jury rules existed, the Indiana Rules of Trial Procedure provided such guidance as there was relating to juries, largely limited to matters of the right to trial by jury, the number of jurors, peremptory challenges, and instructions.²² Creating a separate section of jury rules to the Indiana Rules of Court reflected the supreme court's conclusion that reforming jury practices by using case law would be very laborious. A separate set of new rules also facilitated making multiple changes at one time in a coordinated way.

A leading objective of the whole endeavor has been to ensure a more representative cross-section of the public in each jury trial. For example Jury Rule 6 provides for narrow construction of statutory exemptions to jury service.

17. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280-81 (1996).

18. 2 CITIZENS COMM'N, *supra* note 11, at ii-iii.

19. 1 CITIZENS COMM'N FOR THE FUTURE OF IND. COURTS & THE JUDICIAL ADMIN. COMM. OF THE IND. JUDICIAL CONFERENCE, JURIES FOR THE 21ST CENTURY 58-59 (2000).

20. *Id.*

21. Adopted late in 2001, the rules became effective at the beginning of 2003. *See* IND. JURY RULES (2005).

22. *See* IND. TRIAL R. 38, 39, 47, 51 (2000).

Legislative efforts both last year and this have sought to decrease the number of exemptions available.²³ In addition, Jury Rule 2 requires that the local jury administrator supplement the voter registration lists used to compile the jury pool by using at least one additional source of names—such as a list of utility customers, property taxpayers, telephone directories, etc. As with the elimination of exemptions, legislators interested in jury reform are working to authorize jury administrators to use whatever mix of lists that will produce the widest participation.²⁴

But once we have a representative list of potential jurors, how do we ensure that prospective jurors actually show up? On the premise that at least some citizens do not appear for duty when summoned because they lack information, the Citizens Commission recommended that jury notices be accompanied by useful information about reporting for jury duty.²⁵ Indiana Jury Rule 4 addresses the notification process by providing a timeline for sending out notices and summons and by requiring that the summons contain “directions to the court, parking, public transportation, compensation, attire, meals, and how to obtain auxiliary aids and services.”²⁶ Once the summoned jurors report for duty, they receive jury orientation in the form of a video that helps prospective jurors understand their role in the legal system, a new requirement contained in Jury Rule 11.²⁷

Jurors who eventually serve on cases have long needed better tools for their job. This is why the 2003 jury rules sanctioned juror note-taking and questioning of witnesses.²⁸ Despite criticisms that juror note-taking can distract jurors, the general public (and specifically former jurors) believe note-taking is a useful tool to assist them through a learning process.²⁹ Indiana decisional law had long held that jurors could take notes, but judges usually did not inform juries of the opportunity to take notes or provide writing material.³⁰ This is why the jury rules require a judge to provide paper for the jury and inform them that they may take notes.

The practice of jurors questioning witnesses was commonplace in Great Britain until the seventeenth century.³¹ A current movement to revive this

23. See *infra* note 45 and accompanying text.

24. See *infra* note 42 and accompanying text; Chief Justice Randall T. Shepard, State of the Judiciary Address (Jan. 19, 2005).

25. 1 CITIZENS COMM’N, *supra* note 19, at 31-34.

26. IND. JURY R. 4.

27. See Jury Orientation Video: “Indiana Jury Service: Duty, Privilege, Honor,” at <http://www.in.gov/judiciary/webcast/info.html>.

28. IND. JURY R. 20(a)(4), (7). These practices were already permissible in trial courts. IND. EVID. R. 614(d); 1 CITIZENS COMM’N, *supra* note 19, at 52-53. The jury rules sanctioned them by requiring judges to read preliminary instructions explaining these rights to jurors largely to remedy inconsistent practices among trial courts. *Id.* at 52.

29. 1 CITIZENS COMM’N, *supra* note 19, at 52.

30. Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 44.

31. BATES, *supra* note 3, at 28.

practice has provoked opposition, such that some consider this practice the most controversial amongst recent reforms.³² But respectable research validates its benefits,³³ and we believe the advantages outweigh any disadvantages.

The desired goal of the jury system, a verdict, can sometimes be elusive. An explanation of what a deadlock is to a jury at an impasse oftentimes leads to exactly that—a deadlock.³⁴ Indiana Jury Rule 28 permits a judge to ask the jurors how they might be assisted, and if necessary, direct further proceedings. Judges have most often responded to these moments by giving counsel time to speak to the jury on the topic they describe as important to the impasse. More assistance in reaching a verdict also comes from juror trial books of instructions, exhibits, and witnesses, and from written final instructions.³⁵

III. THE MOST RECENT REFORM

Even after these groundbreaking changes, reform efforts are still underway. One of the most innovative recommendations in the “Juries for the 21st Century” report, that jurors be allowed to discuss the case prior to deliberations, met strong resistance and was not initially adopted. For instance, the adoption of a “discussion rule” met with great skepticism from members of the supreme court’s rules committee.³⁶ The arguments made against adopting this recommendation were based on the belief that jurors would be unable to remain open minded to new evidence presented over the course of the trial, that the jurors would filter new evidence through their pre-formed conclusions, and that some jurors might be intimidated into adopting a position they did not agree with.³⁷

On concerns such as these, as on some other matters of jury reform, there has been no little contrast between what we say *to jurors* about the magic of their common sense and understanding gained from everyday life and what we lawyers say *to each other* about whether jurors can be “trusted” to comprehend what we say and show in a trial. Concerns about changing the rule against jury discussions had nevertheless been advanced by serious-minded people, and in a legal system that depends upon the impartiality and unassailability of jurors to ensure that the interests of justice are served, those fears needed to be addressed.

Once again, pioneering work examining those concerns emerged from Arizona, where the state had been allowing jurors to discuss evidence in civil trials since 1995 under Arizona Rule of Civil Procedure 39(f). At the request of

32. Carter, *supra* note 30, at 43.

33. BATES, *supra* note 3, at 28; Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 256-62 (1996).

34. Dann & Logan, *supra* note 17, at 283.

35. IND. JURY R. 23, 26.

36. Letter from Supreme Court Committee on Rules of Practice and Procedure to Indiana Supreme Court 5 (June 2, 2004) (on file with author).

37. *Id.* Similar fears were also expressed regarding the implementation of such a rule in Arizona. See SHARI SEIDMAN DIAMOND & NEIL VIDMAR, JUROR DISCUSSIONS DURING CIVIL TRIALS: A STUDY OF ARIZONA’S RULE 39(F) INNOVATION, 12-16 (2002).

the Arizona Superior Court in Pima County, the Supreme Court of Arizona, and the State Justice Institute, an investigatory team from Northwestern University Law School, Duke Law School, and the American Bar Foundation conducted an extended study on the effect of Rule 39(f) by monitoring the process of jury discussions. Their report, issued in 2002, ultimately concluded that allowing jurors to discuss evidence before deliberation had no substantial negative impact on the jury's ability to remain impartial and open-minded.³⁸

Encouraged by the results of the Arizona report, we amended Indiana Jury Rule 20 to include a provision that permits jurors to discuss "the evidence among themselves . . . when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence."³⁹ Jury Rule 20(a)(8) went into effect on January 1, 2005, and we believe that it is an important step in the process of reforming this state's jury system. Besides helping jurors to clarify confusing issues of evidence when they occur, and helping jurors to follow the dynamics of trial, allowing jurors to discuss evidence during the trial treats them as they are: intelligent, responsible adults. Because so much of the public's perception of jury service is built upon anecdotal evidence related by those who have served on juries, treating jurors as capable adults is important not only for promoting a better legal result, but in helping to eliminate the public's conception of jury service as tedious, belittling, and pointless.

Allowing jurors to discuss the evidence before deliberations begin is an important step in reforming the Hoosier jury, but as I discuss below there is still work to be done.

IV. THE NEED FOR ONGOING REFORM

The current version of Indiana Jury Rule 2, as explained above, directs trial court jury administrators to compile the jury pool annually from the county voter registration lists and at least one supplemental list.⁴⁰ This system is certainly better than the traditional method of using solely registered voters lists, but it can and will be improved. I alluded to these improvements in the 2005 State of the Judiciary address, in which I said:

We hope this year to be able to provide every county with easy to use, up-to-date lists of names and addresses from sources like the Bureau of Motor Vehicles and the Department of Revenue. And there are two things the General Assembly could do to help, neither of which will cost anything: give us better access to the existing state-wide voter lists and make it clear that we can summon jurors using whatever mix of lists will produce the widest participation in jury service.⁴¹

To achieve this end, the Judicial Technology and Automation Committee

38. DIAMOND & VIDMAR, *supra* note 37, at 101-07.

39. IND. JURY R. 20(a)(8).

40. IND. JURY R. 2.

41. Chief Justice Randall T. Shepard, State of the Judiciary Address (Jan. 19, 2005).

("JTAC"), a committee of the supreme court, the Judicial Administration Committee of the Judicial Conference, and Purdue University are developing a central repository of jury pool information for all ninety-two Indiana counties.⁴² They plan to merge voter registration records with Bureau of Motor Vehicles and the Department of Revenue records to create a more accurate, centralized jury pool list.⁴³ This list will then be sent to all trial courts in Indiana to decrease the administrative burden placed on local courts by Indiana Jury Rule 2.⁴⁴

The other campaign to create a more representative jury pool is currently underway in the 2005 session of the Indiana General Assembly. Senator Beverly Gard, R.-Greenfield, has authored a bill to eliminate many statutory exemptions from jury duty.⁴⁵ Indiana Code section 33-28-4-8 in its present form automatically excuses many classes of people from jury duty if they desire to be excused, including: those at least sixty-five years old; members of the military in active service; elected or appointed officials at the federal, state, or municipal level; licensed veterinarians; Indianapolis Public School board members; licensed dentists; police officers; firemen; etc. The proposed bill would eliminate these exemptions.

Senator Gard's bill would also protect jurors from a variety of negative actions taken by employers who punish their employees for doing what the law requires by reporting for jury duty. Upon an employee's reasonable notification to their employer of a jury summons, the employee is protected from adverse employment action, which includes being forced to use annual, vacation, or sick leave for days spent at jury duty instead of work.⁴⁶

CONCLUSION

The theme of this year's State of the Judiciary speech was that in our justice system "good enough" can no longer be good enough. While our jury system is certainly "good enough," it is still a work in progress that needs reform. Over the last several years we have taken steps to make the system work in ways that are more effective and more satisfying for all involved.

Our aim now should not be merely a "better" jury system, but the best we can provide. The people of this state deserve nothing less, and we in the justice system owe to them our dedication to make good on the promises of our constitution.

42. *Federal Grant Funds Help Develop Centralized Jury Pool Repository*, INDIANA COURT TIMES, Spring/Summer 2004, at 9.

43. *Id.*

44. *Id.*

45. S.B. 0045, 114th General Assembly, 1st Reg. Sess. (Ind. 2005).

46. *Id.*

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2004*

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The Indiana Supreme Court experienced an atypical year in 2004 in a number of noteworthy respects. The year saw an atypical amount of agreement among the justices, an atypical number of companion cases, an atypical number of cases that came to the court through unusual procedural devices and at least two atypical uses of the court's power to summarily affirm.

First, the justices demonstrated a remarkable level of agreement in 2004. The court issued 68 unanimous opinions, which amounted to almost 75% of all of its cases. Of the 46 civil opinions the court handed down, there were only 7 cases that drew a dissent. In fact, the court had the lowest percentage of dissenting opinions since a constitutional amendment revised the court's jurisdiction as of January 1, 2001. Between 2001 and 2003, the justices dissented in an average of 23.2% of all cases. In 2004, the justices dissented in only 14.3% of the court's cases. In fact, Justices Rucker and Dickson each authored nearly as many dissents in 2003 as the entire court did in 2004.

Another barometer of the agreement of the justices in 2004 is a corresponding decrease in the number of 3-2 opinions. The court handed down only 10 split opinions in 2004, which was by far the fewest since the change in the court's jurisdiction. In 2001, 2002, and 2003, the court handed down 28, 26, and 18 split decisions respectively.

Second, the level of agreement among the justices is at least partially explained by the number of companion cases issued in 2004. The court issued a sizeable number of companion opinions in 2004 and the justices' votes tended

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this Article and worked hard to bring it to fruition for many years. The press of a successful practice has led Kevin to hand the reins over, but the success of this Article is attributable to his initial work. The authors also must recognize Donald Glick (Mr. Stephenson's father-in-law) who spent Thanksgiving Day writing the spreadsheet that made the statistics in this year's article much easier to glean from the raw data.

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to be the same across those opinions. The court handed down 16 opinions that were related to at least one other case. Put slightly differently, 20% of the court's opinions in 2004 were related to at least one companion case.

This total included a particularly noteworthy cluster of cases dealing with Indiana's death penalty statute. On May 25, 2004, the court handed down five opinions addressing interrelated issues under Indiana's death penalty statute, including Indiana's response to recent United States Supreme Court jurisprudence on the jury's role in sentencing. In essence, the court issued five opinions in one day that affected actual or potential death sentences, which certainly qualifies as an atypical experience.

Third, the court heard a number of cases through atypical procedural devices. The court controls its docket through the classic transfer procedure familiar to any Indiana lawyer.¹ The remainder of the court's caseload is usually comprised of attorney discipline cases or direct appeals of death sentences and sentences for life in prison without parole. However, the Indiana Appellate Rules short-circuit this standard procedure in certain rare instances when public policy demands it. In 2004, the court was called on to hear cases under several of these procedures. For instance, the court granted an emergency petition to transfer under Indiana Appellate Rule 56(A), which by its very terms will be granted only in "rare cases."² This rule allows an appeal to bypass the court of appeals when it "involves a substantial question of law of great public importance" and when "an emergency exists requiring a speedy determination."³ In *Board of School Commissioners v. Walpole*, the court invoked this procedure in a case involving a teacher's attempt to conduct discovery prior to an administrative hearing on his suspension.⁴ This appears to be the first decision in a Rule 56(A) case since that rule was revised and re-codified from the former Rule 4(A)(9). In fact, it has been more than four years since the court handed down an opinion in a case that bypassed the court of appeals under the emergency power granted by either of these rules.⁵ The court also heard a direct appeal of a trial court's declaration that a state statute was unconstitutional.⁶ The court has "mandatory and exclusive jurisdiction" over such an appeal.⁷ Although less unusual, the court also addressed a certified question in 2004.⁸

Fourth, and perhaps most significantly for practicing attorneys, the court showed a willingness to use its power to summarily affirm the court of appeals in atypical ways in 2004. In the usual case, the court takes jurisdiction over an

1. IND. APP. R. 4(A).

2. *See* IND. APP. R. 56(A).

3. *Id.*

4. *Bd. of Sch. Comm'rs v. Walpole*, 801 N.E.2d 622 (Ind. 2004).

5. *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443, 444 (Ind. 2001) (noting that court had granted transfer under the former Rule 4(A)(9)).

6. *Ind. Dep't of Natural Res. v. Newton County*, 802 N.E.2d 430 (Ind. 2004).

7. IND. APP. R. 4(A)(1)(b).

8. *Simon v. United States*, 805 N.E.2d 798 (Ind. 2004).

entire appeal and will address all of the dispositive issues raised by the appeal.⁹ When the court takes transfer over an appeal, the court of appeals opinion is automatically vacated. However, the court has two devices that allow the court to defer elaborate discussion of discrete issues within a case by leaving parts of the court of appeals opinion intact. Known as its powers to “summarily affirm” or “expressly adopt” a court of appeals opinion,¹⁰ the court used these powers at least 16 times in 2004.¹¹ Two of these opinions are particularly noteworthy because the court appears to have granted transfer specifically to correct an isolated, discrete error within the case and did not issue an opinion that engaged in its typical discussion of the facts and other dispositive issues of the case. These cases are in a sense the opposite of the way the court has summarily affirmed in the past and the court in essence “summarily reversed” the court of appeals.

For instance, the court issued a three-paragraph opinion in *State v. Berryman*¹² that summarily affirmed the court of appeals but only after explicitly *modifying* a quote in the court of appeals opinion. The court of appeals stated that “[h]ad there been such an order compelling Berryman’s cooperation, and a hearing advising him that the testimony of his experts could be excluded if he failed to cooperate with the court-appointed experts, *the result in this case may have been different.*”¹³ The supreme court rewrote this quote:

Pursuant to Ind. Appellate Rule 58(A), we grant the State’s petition seeking transfer of jurisdiction and modify the previously quoted statement to read as follows: “Had there been such an order compelling Berryman’s cooperation, and a hearing advising him that the testimony

9. IND. APP. R. 56(B) (stating that petition to transfer must “request[] that *the case* be transferred to the Supreme Court”) (emphasis added).

10. *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 386 n.4 (Ind. 1998) (quoting IND. APP. R. 11(B)(3)). When the court “summarily affirms an opinion, it “decline[s] to review the remainder of the opinion” and in essence “partially den[ies] transfer on these issues.” *Id.* The court can also “expressly adopt” the court of appeals’ opinion, which “indicates that [the court] accept[s] the reasoning of a Court of Appeals’ opinion as [its] own.” *Id.*

11. The court summarily affirmed at least part of the court of appeals opinion in the following cases: *Pugh v. State* 819 N.E.2d 375 (Ind. 2004); *Escobedo v. BHM Health Assocs., Inc.*, 818 N.E.2d 930 (Ind. 2004); *Merlington v. State*, 814 N.E.2d 269 (Ind. 2004); *Bojrab v. Bojrab*, 810 N.E.2d 1008 (Ind. 2004); *Patton v. State*, 810 N.E.2d 690 (Ind. 2004); *Penrod v. State*, 810 N.E.2d 345 (Ind. 2004); *Riggs v. State*, 809 N.E.2d 322 (Ind. 2004); *Endres v. Ind. State Police*, 809 N.E.2d 320 (Ind. 2004); *In re Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639 (Ind. 2004); *In re K.G.*, 808 N.E.2d 631 (Ind. 2004); *Schlosser v. Rock Indus., Inc.*, 804 N.E.2d 1140 (Ind. 2004); *Daugherty v. Indus. Contracting & Erecting*, 802 N.E.2d 912 (Ind. 2004); *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (Ind. 2004); *Time Warner Entm’t Co. v. Whiteman*, 802 N.E.2d 886 (Ind. 2004); *Hines v. State*, 801 N.E.2d 634 (Ind. 2004); *State v. Berryman*, 801 N.E.2d 170 (Ind. 2004).

12. 801 N.E.2d 170 (Ind. 2004).

13. *Id.* (quoting *State v. Berryman*, 796 N.E.2d 741 (Ind. Ct. App. 2003)) (emphasis added).

of his experts could be excluded if he failed to cooperate with the court-appointed experts, *the State would have prevailed on this issue.*" In all other respects, we summarily affirm the opinion of the Court of Appeals.¹⁴

In all other respects, the court simply left the court of appeals opinion as it was.

Similarly, in *Hines v. State*,¹⁵ the court granted transfer explicitly because it found that "[t]here are two aspects of the opinion of the court of appeals worthy of particular mention."¹⁶ After quoting, analyzing, and approving two passages of the court of appeals opinion, the court invoked its power to expressly adopt that opinion and did not otherwise discuss the remainder of the case.

Hines was a 5-0 opinion, while *Berryman* was a per curiam opinion that drew a dissent from Justice Dickson.

It remains to be seen whether the methods these opinions employed were a result of their particular facts and circumstances or whether they are a harbinger of a creative new practice through which the court can make pinpoint corrections to or expressions of approval of a lower court's opinion. Especially in light of the court's expanded power to control its own docket, these cases make the court's power to summarily affirm or expressly adopt an area to watch in upcoming years.

The following is a description of the highlights from each table.

Table A. The supreme court issued 92 opinions in 2004. This continues a downward trend in the raw number of opinions since the time its jurisdiction was revised. In 2001, 2002, and 2003, the court handed down 211, 190, and 108 opinions respectively. Since the change in the court's jurisdiction, it has averaged 150 opinions per year.

The court continues to decide a mix of civil and criminal appeals. In 2004, the court's docket was split evenly between civil and criminal cases, as it decided 46 criminal cases and 46 civil cases. However, the raw numbers do not take into account (1) the sheer size and importance of the number of death penalty opinions issued by the court in 2004; and (2) the fact that many of the companion cases arose in the criminal context. As such, it is difficult to gauge exactly how much of the court's work in 2004 was geared toward either type of case. In any event, the nearly even split between criminal and civil cases is a departure from 2003, during which 63.9% of the opinions were civil.

Justice Sullivan delivered the most opinions in 2004 with 20, but was trailed closely by Justice Boehm with 19. The two justices were almost exactly opposite in the *types* of opinions they issued. Justice Boehm handed down 11 civil and 8 criminal opinions, while Justice Sullivan handed down 13 criminal and 7 civil opinions. Chief Justice Shepard issued 16 opinions; Justice Rucker handed down 14; and Justice Dickson had 12 opinions, including most of the majority opinions

14. *Id.* (emphasis added).

15. 801 N.E.2d 634 (Ind. 2004).

16. *Id.* at 635.

in the complex death penalty appeals discussed herein. The court also issued 11 per curiam opinions, down from an average of 22 in the previous three years.

As discussed above, the raw number of dissents issued this year declined as the justices wrote a total of only 13 dissenting opinions. Only 14.1% of all of the court's opinions drew a dissent. This number is a decline in the percentage of dissenting opinions from previous years, as 32 and 44% of all cases contained a dissent in 2002 and 2003. Justice Dickson dissented the most with 6 dissents, nearly half of the court's total.

Table B-1. For civil cases, Chief Justice Shepard and Justice Boehm were the two justices most aligned at 87.8%. Justices Shepard and Sullivan were also aligned in 87% of the civil cases. Conversely, Justices Sullivan and Dickson were least aligned with 78.3%. By contrast, the two justices least aligned in civil cases in 2003 were Chief Justices Shepard and Justice Rucker, who were aligned in only 61.5% of the cases.

Table B-2. Chief Justice Shepard and Justice Boehm were also the most aligned in criminal cases, as they were in agreement in 90.1% of those cases. Justice Dickson and Justice Rucker were in agreement in only 80.4% of the court's criminal cases, the lowest of any two justices.

Table B-3. For all cases, Chief Justice Shepard and Justice Boehm were the most aligned and agreed in 89.4% of all cases. Chief Justice Shepard and Justice Sullivan were second with 87.9%. Justice Rucker agreed with Justice Sullivan and Chief Justice Shepard in 81% of all cases, which was tied for the least. The same was true in 2003, as Justice Rucker agreed with Justice Sullivan and Chief Justice Shepard less than any other pairing of justices.

Overall, Chief Justice Shepard was the most aligned with his fellow justices, and Justice Rucker was the least aligned.

Table C. As discussed above, the percentage of unanimous opinions rose in 2004. In all, 72.7% of the court's opinions were unanimous, compared to 66.1% in 2003. The percentage of cases with at least one dissent dropped accordingly. In 2004, only 14.3% of all cases drew at least one dissent. In 2003, 2002, and 2001, the percentage of cases with at least one dissent was 27.8, 23.2, and 18.5% respectively.

Table D. Both the raw number and percentage of 3-2 decisions dropped in 2004. The court issued only 10 3-2 decisions in 2004. In 2003, 2002, and 2001, the court handed down 18, 26, and 27 split decisions respectively.

As in previous years, Chief Justice Shepard continued to be a pivotal vote in 3-2 cases. The Chief Justice was in the majority of all but two of the court's 3-2 decisions. In fact, he authored more half of the 3-2 opinions he joined. This result is consistent with previous years. From 2001 to 2003, the court handed down 72 decisions in which the justices split 3-2. The Chief Justice was in the majority in all but 13 of those cases.

Justice Sullivan's vote also appears to be pivotal in recent 3-2 cases. In

2004, he joined all but two of the court's 3-2 opinions. In 2003, he joined 14 of the court's 18 split decisions.

Table E-1. Overall, the court affirmed cases only 23.5% of the time. Civil appeals were affirmed 13.9% of the time and nonmandatory criminal appeals were affirmed 24.2% of the time.

Table E-2. In 2004, the court granted fewer petitions for transfer in civil cases. The court granted transfer in 16.4% of the civil cases. This percent is a decrease from 2003 and 2002, where the court granted transfer 21.2 and 23.4% of the time.

The percentage of transfer petitions granted in criminal cases remained consistent with previous years. In 2004, the court granted 7.7% of all petitions to transfer in criminal cases. In 2003, 2002, and 2001, the court granted 9.8, 7.5, and 6.6% of transfer petitions in criminal cases respectively.

Table F. The court continued to hear a diverse spectrum of cases in 2004. As mentioned, the court addressed several important death penalty issues in 2004, and its workload in those cases is reflected in the fact that 10 of its 91 opinions came in cases where the sentence was either death or life without parole. However, the court also addressed several areas important to commercial law practitioners. For instance, the court handed down 6 opinions that addressed contract, corporation, or insurance law. On the other hand, the court only handed down 2 opinions in the divorce or child support category. In the past 3 years, the court averaged 6 opinions a year on these topics.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	7	9	16	0	0	0	1	0	1
Dickson, J. ^e	8	4	12	0	0	0	3	3	6
Sullivan, J. ^e	13	7	20	3	0	3	0	1	1
Boehm, J. ^e	8	11	19	2	2	4	1	1	2
Rucker, J. ^e	9	5	14	4	1	5	1	2	3
Per Curiam	1	10	11						
Total	46	46	92	9	3	12	6	7	13

^a These are opinions and votes on opinions by each justice and in per curiam in the 2004 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 213 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justices declined to participate in the following cases: *Baker v. Marion County Office of Family & Children & Child Advocates, Inc.*, 810 N.E.2d 1035 (Ind. 2004) (Sullivan, J.); *State v. Boles*, 810 N.E.2d 1016 (Ind. 2004) (Shepard, C.J.); *In re Termination of the Parent-Child Relationship of E.T.*, 808 N.E.2d 639 (Ind. 2004) (Sullivan, J.); *In re K.G.*, 808 N.E.2d 631 (Ind. 2004) (Sullivan, J.).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		39	40	42	40
	S		0	0	1	0
	D	---	39	40	43	40
	N		49	46	49	49
	P		79.6%	87.0%	87.8%	81.6%
Dickson, J.	O	39		36	38	38
	S	0		0	1	1
	D	39	---	36	39	39
	N	49		46	49	49
	P	79.6%		78.3%	79.6%	81.6%
Sullivan, J.	O	40	36		38	37
	S	0	0		1	0
	D	40	36	---	39	37
	N	46	46		46	46
	P	87.0%	78.3%		84.6%	80.4%
Boehm, J.	O	42	38	38		39
	S	1	1	1		0
	D	43	39	39	---	39
	N	49	49	46		49
	P	87.8%	79.6%	84.6%		79.6%
Rucker, J.	O	40	38	37	39	
	S	0	1	0	0	
	D	40	39	37	39	---
	N	49	49	46	49	
	P	81.6%	79.6%	81.6%	79.6%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 39 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES[§]

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		40	40	40	37
	S		0	0	1	0
	D	---	40	40	41	37
	N		45	45	45	45
	P		88.0%	88.9%	90.1%	82.2%
Dickson, J.	O	40		40	39	37
	S	0		0	0	0
	D	40	---	40	39	37
	N	45		46	46	46
	P	88.9%		87.0%	84.8%	80.4%
Sullivan, J.	O	40	40		39	38
	S	0	0		0	0
	D	40	40	---	39	38
	N	45	46		46	46
	P	88.9%	87.0%		84.8%	82.6%
Boehm, J.	O	40	39	39		38
	S	1	0	0		2
	D	41	39	39	---	40
	N	45	46	46		46
	P	90.1%	84.8%	84.8%		87.0%
Rucker, J.	O	37	37	38	38	
	S	0	0	0	2	
	D	37	37	38	40	---
	N	45	46	46	46	
	P	82.2%	80.4%	82.6%	87.0%	

[§] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 40 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		79	80	82	77
	S		0	0	2	0
	D	---	79	80	84	77
	N		94	91	94	94
	P		84.0%	87.9%	89.4 %	81.9 %
Dickson, J.	O	79		76	77	75
	S	0		0	1	1
	D	79	---	76	78	76
	N	94		92	95	95
	P	94.0%		82.6%	82.1 %	80.0 %
Sullivan, J.	O	80	76		77	75
	S	0	0		1	0
	D	80	76	---	78	75
	N	91	92		92	92
	P	87.9%	82.6%		84.8 %	81.5 %
Boehm, J.	O	82	77	77		77
	S	2	1	1		2
	D	84	78	78	---	79
	N	94	95	92		95
	P	89.4%	82.1 %	84.8%		83.2 %
Rucker, J.	O	77	75	75	77	
	S	0	1	0	2	
	D	77	76	75	79	--
	N	94	95	92	95	
	P	81.9%	80.0%	81.5 %	83.2%	

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 79 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2004. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

Unanimous ^j			Unanimous with Concurrence ^k			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
32	36	68 (74.7%)	8	2	10 (11.0%)	6	7	13 (14.3%)	91

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions^m
1. Shepard, C.J., Sullivan, J., Boehm, J.	2
2. Shepard, C.J., Dickson, J., Sullivan, J.	3
3. Shepard, C.J., Rucker, J., Sullivan, J.	1
4. Shepard, C.J., Dickson, J., Boehm, J.	1
5. Shepard, C.J., Dickson, J., Rucker, J.	1
6. Dickson, J., Sullivan, J., Rucker, J.	2
Total ⁿ	10

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 2004 term's 3-2 decisions were:

1. Shepard, C.J., Sullivan, J., Boehm, J.: *Infinity Prods., Inc. v. Quandt*, 810 N.E.2d 1028 (Ind. 2004) (Shepard, C.J.); *Breitweiser v. Ind. Office of Env'tl. Adjudication*, 810 N.E.2d 699 (Ind. 2004) (Shepard, C.J.).

2. Shepard, C.J., Dickson, J., Sullivan, J.: *Escobedo v. BHM Health Assocs., Inc.*, 818 N.E.2d 930 (Ind. 2004) (Sullivan, J.); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004) (Dickson, J.); *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004) (Sullivan, J.).

3. Shepard, C.J., Rucker, J., Sullivan, J.: *Kennedy v. Guess Inc.*, 806 N.E.2d 776 (Ind. 2004) (Shepard, C.J.).

4. Shepard, C.J., Dickson, J., Boehm, J.: *State v. Barker*, 809 N.E.2d 312 (Ind. 2004) (Dickson, J.).

5. Shepard, C.J., Dickson, J., Rucker, J.: *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (Dickson, J.).

6. Dickson, J., Sullivan, J., Rucker, J.: *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (Ind. 2004) (Sullivan, J.); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004) (Sullivan, J.).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	27 (84.4%)	5 (15.6%)	32
Direct Civil Appeals	4 (100%)	0 (0%)	4
Criminal Appeals Accepted for Transfer	25 (75.8%)	8 (24.2%)	33
Direct Criminal Appeals	6 (50.0%)	6 (50.0%)	12
Total	62 (76.5%)	19 (23.5%)	81 ^q

^o Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^p Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 8 attorney discipline opinions, 1 judicial discipline opinion, 1 order on rehearing, and 1 opinion related to certified questions. This also does not include 6 opinions which considered petitions for post-conviction relief.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2004^r

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	234 (83.6%)	46 (16.4%)	280
Criminal ^t	480 (92.3%)	40 (7.7%)	520
Juvenile	36 (92.3%)	3 (7.7%)	39
Total	750 (89.4%)	89 (10.6%)	839

^r This Table analyzes the disposition of petitions to transfer by the court. See IND. APP. R. 58(A).

^s This also includes petitions to transfer in tax cases and workers' compensation cases.

^t This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^u

Original Actions	Number
• Certified Questions	1 ^v
• Writs of Mandamus or Prohibition	0
• Attorney Discipline	7 ^w
• Judicial Discipline	1 ^x
Criminal	
• Death Penalty	10 ^y
• Fourth Amendment or Search and Seizure	2 ^z
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	1 ^{aa}
Trusts, Estates, or Probate	0
Real Estate or Real Property	2 ^{bb}
Personal Property	0
Landlord-Tenant	0
Divorce or Child Support	2 ^{cc}
Children in Need of Services (CHINS)	1 ^{dd}
Paternity	1 ^{ee}
Product Liability or Strict Liability	0
Negligence or Personal Injury	5 ^{ff}
Invasion of Privacy	0
Medical Malpractice	0
Indiana Tort Claims Act	1 ^{gg}
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	3 ^{hh}
Contracts	4 ⁱⁱ
Corporate Law or the Indiana Business Corporation Law	1 ^{jj}
Uniform Commercial Code	0
Banking Law	0
Employment Law	4 ^{kk}
Insurance Law	1 ^{ll}
Environmental Law	2 ^{mm}
Consumer Law	0
Workers' Compensation	4 ⁿⁿ
Arbitration	0
Administrative Law	6 ^{oo}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	0
Indiana Constitution	2 ^{pp}

^u This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2004. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

- ^v Simon v. United States, 805 N.E.2d 798 (Ind. 2004).
- ^w *In re Anonymous*, 819 N.E.2d 376 (Ind. 2004); *In re Small*, 818 N.E.2d 466 (Ind. 2004); *In re Davidson*, 814 N.E.2d 266 (Ind. 2004); *In re Cassady*, 814 N.E.2d 247 (Ind. 2004); *In re Roberts*, 809 N.E.2d 841 (Ind. 2004); *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004); *In re Allen*, 802 N.E.2d 922 (Ind. 2004).
- ^x *In re Kouros*, 816 N.E.2d 21 (Ind. 2004).
- ^y *Manus v. State*, 814 N.E.2d 253 (Ind. 2004); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Clark v. State*, 808 N.E.2d 1183 (Ind. 2004); *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Saylor v. State*, 808 N.E.2d 646 (Ind. 2004); *Washington v. State*, 808 N.E.2d 617 (Ind. 2004).
- ^z *Black v. State*, 810 N.E.2d 713 (Ind. 2004); *Gee v. State*, 810 N.E.2d 338 (Ind. 2004).
- ^{aa} *Bd. of Sch. Comm'rs v. Walpole*, 801 N.E.2d 622 (Ind. 2004).
- ^{bb} *Story Bed & Breakfast, LLP v. Brown County Area Plan Comm'n*, 819 N.E.2d 55 (Ind. 2004); *Fulton County Advisory Planning Comm'n v. Groninger*, 810 N.E.2d 704 (Ind. 2004).
- ^{cc} *Bojrab v. Bojrab*, 810 N.E.2d 1008 (Ind. 2004); *Gamas-Castellanos v. Gamas*, 803 N.E.2d 665 (Ind. 2004).
- ^{dd} *In re Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639 (Ind. 2004).
- ^{ee} *In re Paternity of A.B.*, 813 N.E.2d 1173 (Ind. 2004).
- ^{ff} *Passmore v. Multi-Mgmt. Servs., Inc.*, 810 N.E.2d 1022 (Ind. 2004); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004); *Rhodes v. Wright*, 805 N.E.2d 382 (Ind. 2004); *Schlosser v. Rock Indus., Inc.*, 804 N.E.2d 1140 (Ind. 2004); *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004).
- ^{gg} *Niksich v. Cotton*, 810 N.E.2d 1003 (Ind. 2004).
- ^{hh} *Ind. Dep't of Revenue v. Trump Ind., Inc.*, 814 N.E.2d 1017 (Ind. 2004); *Ind. Dep't of Revenue v. 1 Stop Auto Sales, Inc.*, 810 N.E.2d 686 (Ind. 2004); *Lake County Auditor v. Burks*, 802 N.E.2d 896 (Ind. 2004).
- ⁱⁱ *Theising v. ISP.com, LLC*, 805 N.E.2d 778 (Ind. 2004); *ISP.com LLC v. Theising*, 805 N.E.2d 767 (Ind. 2004); *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (Ind. 2004); *Time Warner Entm't Co. v. Whiteman*, 802 N.E.2d 886 (Ind. 2004).
- ^{jj} *Escobedo v. BHM Health Assocs., Inc.*, 818 N.E.2d 930 (Ind. 2004).
- ^{kk} *Infinity Prods., Inc. v. Quandt*, 810 N.E.2d 1028 (Ind. 2004); *Endris v. Ind. State Police*, 809 N.E.2d 320 (Ind. 2004); *Highhouse v. Midwest Orthopedic Inst., P.C.*, 807 N.E.2d 737 (Ind. 2004); *Bd. of Sch. Comm'rs v. Walpole*, 801 N.E.2d 622 (Ind. 2004).
- ^{ll} *M-Plan, Inc. v. Ind. Comprehensive Ins. Ass'n*, 809 N.E.2d 834 (Ind. 2004).
- ^{mm} *Huffman v. Ind. Office of Env'tl. Adjudication*, 811 N.E.2d 806 (2004); *Breitweiser v. Ind. Office of Env'tl. Adjudication*, 810 N.E.2d 699 (Ind. 2004).
- ⁿⁿ *Knoy v. Cary*, 813 N.E.2d 1170 (Ind. 2004); *Global Constr. Inc. v. March*, 813 N.E.2d 1163 (Ind. 2004); *Bertoch v. NBD Corp.*, 813 N.E.2d 1159 (Ind. 2004); *Daugherty v. Indus. Contracting & Erecting*, 802 N.E.2d 912 (Ind. 2004).
- ^{oo} *Knoy v. Cary*, 813 N.E.2d 1170 (Ind. 2004); *Global Constr. Inc. v. March*, 813 N.E.2d 1163 (Ind. 2004); *Bertoch v. NBD Corp.*, 813 N.E.2d 1159 (Ind. 2004); *Huffman v. Ind. Office of Env'tl. Adjudication*, 811 N.E.2d 806 (Ind. 2004); *M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834 (Ind. 2004); *Worman Enters., Inc. v. Boone County Solid Waste Mgmt. Dist.*, 805 N.E.2d 369 (Ind. 2004).
- ^{pp} *Endres v. Ind. State Police*, 809 N.E.2d 320 (Ind. 2004); *Ind. Dep't of Natural Res. v. Newton County*, 802 N.E.2d 430 (Ind. 2004).

APPELLATE PROCEDURE

KEVIN S. SMITH*

INTRODUCTION

This Article surveys opinions, orders, and other developments in the area of state appellate procedure in Indiana during the most recent reporting period.¹ Part I examines rule amendments affecting Indiana appellate practitioners. Part II discusses decisions and orders issued during the reporting period that affect or relate to matters of appellate procedure and practice. Part III discusses miscellaneous information relevant to Indiana appellate practice and procedure.

I. RULE AMENDMENTS

A. *Effective January 1, 2005*

During the reporting period, the Indiana Supreme Court completely overhauled Administrative Rule 9, which concerns the confidentiality of court records.² Like a pebble thrown into a still pond, the ripples from this overhaul quietly but forcefully made their way into Indiana's other practice and procedure rules, including the Rules of Appellate Procedure.³ The changes, discussed below, went into effect January 1, 2005.

The predecessor to the revised Administrative Rule 9 was relatively short. In accordance with Indiana's Access to Public Records Act,⁴ the Rule simply listed fourteen classes of documents "declared confidential."⁵ The revised Administrative Rule 9, however, not only expands the classes of "confidential" records,⁶ but also includes, among other things: a detailed explanation of the rule's purpose;⁷ an explanation of who has access to court records;⁸ a

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1. This Article picks up where its predecessor, *see* Douglas E. Cressler, *Appellate Procedure*, 37 IND. L. REV. 907, 907 n.1 (2004) [hereinafter Cressler 2004], left off, covering the time period from October 1, 2003, through September 30, 2004.

2. *See* Order Amending Administrative Rules (Ind. Feb. 25, 2004) (No. 94S00-0402-MS-94); Order Amending Administrative Rules, at 17 (Ind. Sept. 30, 2004) (No. 94S00-0402-MS-94).

3. *See* Order Amending Rules of Appellate Procedure (Ind. Sept. 30, 2004) (No. 94S00-0402-MS-94) (revising IND. APP. R. 2 & 9).

4. IND. CODE § 5-14-3-4 (2004).

5. Order Amending Administrative Rules, *supra* note 2, at 1-2.

6. *Compare id.* at 1-2 (showing former rule), *with id.* at 9-13 (showing "records excluded from public access" under new rule); *see also* IND. ADMIN. R. 9(G).

7. IND. ADMIN. R. 9(A).

8. IND. ADMIN. R. 9(B).

“Definitions” section;⁹ a request for courts to make certain court records, when available in electronic form, “remotely accessible”;¹⁰ procedures related to bulk distribution of court records and acquisition of compiled information derived from information contained in more than one court record;¹¹ procedures for persons seeking to prohibit otherwise publicly accessible court records from public access;¹² procedures for seeking information excluded from public access;¹³ explanations concerning how and when accessible court records may be procured;¹⁴ a section discussing contracts with vendors providing information technology services pertaining to court records;¹⁵ and a provision granting immunity from liability to certain persons (namely clerks, court personnel, and court agents) who unintentionally or unknowingly disclose confidential or erroneous information.¹⁶ The new Administrative Rule 9 also contains detailed commentary following each of the new rule’s subsections.¹⁷

The new rule

is the culmination of an intense ten-month effort of a special Task Force on Access to Court Records organized by the Supreme Court Records Management Committee in January 2003. The task force was chaired by Justice Brent Dickson of the Indiana Supreme Court and included a broad representation of numerous constituencies, including the media, victim advocacy groups, judges, private attorneys, clerks, the Indiana Attorney General’s office, and the Indiana Civil Liberties Union.¹⁸

The sweeping changes to Administrative Rule 9 were so extensive that they prompted the Indiana Supreme Court’s Division of State Court Administration to publish a fifty-two-page “Public Access to Court Records Handbook” explaining the new rule.¹⁹

Administrative Rule 9 most dramatically affects Indiana litigators through a contemporaneous amendment to Rule 5 of the Indiana Rules of Trial Procedure. Commensurate with the amendment of Administrative Rule 9, Trial Rule 5 added subsection G, which states:

(G) Filing of Documents and Information Excluded from Public Access

9. IND. ADMIN. R. 9(C).

10. IND. ADMIN. R. 9(E).

11. IND. ADMIN. R. 9(F).

12. IND. ADMIN. R. 9(H).

13. IND. ADMIN. R. 9(I).

14. IND. ADMIN. R. 9(J).

15. IND. ADMIN. R. 9(K).

16. IND. ADMIN. R. 9(L).

17. *See generally* IND. ADMIN. R. 9.

18. INDIANA SUPREME COURT, DIVISION OF STATE COURT ADMINISTRATION, PUBLIC ACCESS TO COURT RECORDS HANDBOOK 4 (Dec. 2004 ed.), available at www.in.gov/judiciary/admin/accesshandbook.pdf. In addition, questions pertaining to Administrative Rule 9 may be directed to the Division of State Court Administration by calling (317) 232-2542.

19. *See id.*

and Confidential Pursuant to Administrative rule 9(G)(1). Every document prepared by a lawyer or party for filing in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

- (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper, marked "Not for Public Access."
- (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.
- (3) With respect to documents filed in electronic format, the trial court, by order or local rule, may provide for compliance with this rule in a manner that separates and protects access to information excluded from public access.
- (4) This rule does not apply to a record sealed by the court pursuant to IC 5-14-3-5.5 or otherwise, nor to records to which public access is prohibited pursuant to Administrative Rule 9(H) [sic].²⁰

Of note for appellate practitioners is that Trial Rule 5's "separate identification" requirement is not limited to trial court filings. To incorporate the changes brought about by Administrative Rule 9's amendments, the supreme court amended Indiana's Rules of Appellate Procedure by adding new subsections to Rules 2 and 9. Rule 2, the "Definitions" section, now contains a new subsection "N," which states, "[t]he term 'Case Record' shall mean a record defined by Administrative Rule 9(C)(2). 'Case Records Excluded from Public Access' shall mean records identified in Administrative Rule 9(G)(1)."²¹ Rule 9, concerning the initiation of the appeal, now contains a new subsection "J," which states, "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)."²² Accordingly, documents filed by attorneys with the Indiana Court of Appeals and Indiana Supreme Court will be subject to Trial Rule 5(G)'s identification/redaction requirements if those documents contain any information excluded from public access pursuant to Administrative Rule 9(G)(1).

Comparatively, the changes brought about by Administrative Rule 9 affect appellate lawyers much less than their trial lawyer counterparts. Both trial and appellate lawyers will have to review the documents they themselves create, such

20. IND. TRIAL R. 5(G) (effective Jan. 1, 2005). IND. TRIAL R. 5(G)(4) actually cites "Administrative Rule 9(H)." This is a scrivener's error and should read "Administrative Rule 9(G)."

21. IND. APP. R. 2(N).

22. IND. APP. R. 9(G).

as motions and briefs, to insure compliance with Trial Rule 5(G). The bigger potential problem is with documentary evidence not created by an attorney. Every page will have to be reviewed and confidential material culled out and placed on green paper before documentary evidence can be filed with the trial court. Unlike trial lawyers, appellate lawyers, except when seeking an original action before the supreme court,²³ typically are not responsible for assembling and filing evidentiary materials. Rather, that responsibility typically falls on the trial court clerk or administrative agency from which the appeal is sought.²⁴ Appellate practitioners still should be careful in those few instances where they, and not the trial court clerk or administrative agency, are responsible for filing documents they themselves did not create, such as attachments to the Appellant's Case Summary;²⁵ materials filed in lieu of or outside of the Clerk's Record (such as a statement of the evidence,²⁶ an agreed statement of the record,²⁷ or a verified motion of facts outside the record on appeal²⁸); or when filing appendices.²⁹

B. Proposed Rule Changes to Watch for

In May 2004, the Indiana State Bar Association's Appellate Practice Section ("Appellate Practice Section") sent a letter to the Indiana Supreme Court Committee on Rules of Practice and Procedure proposing certain changes to the current Indiana Rules of Appellate Procedure. The letter was the culmination of extensive work by the Appellate Practice Section, which involved a survey sent to appellate practitioners, court clerks, court reporters, law clerks, faculty, and judges across Indiana; reports and recommendations drafted by two subcommittees that reviewed more than 100 responses to the survey; an executive committee's review of the subcommittee reports and recommendations; and creation of a final report and recommendations by the executive committee to the Section's council and officers.³⁰ Those proposed rule changes follow.

1. *Appellate Rule 12(A)*.—The Appellate Practice Section proposes adding the following emphasized language to Appellate Rule 12(A):

Clerk's Record. Unless the Court on Appeal orders otherwise, the trial

23. See generally IND. ORIGINAL ACTION R. 3(C).

24. See IND. APP. R. 10-13.

25. See IND. APP. R. 15(D). Notice that some of the documents listed in Rule 15(D) are those created by the trial court, such as the judgment or order from which the party is appealing. IND. APP. R. 15(D)(1)-(2). Even if a trial court failed to comply with the requirements of Administrative Rule 9 when issuing its judgment or order, the appellate practitioner would still be required by Appellate Rule 9(J) to file the trial court's order in a manner that complies with the requirements of Trial Rule 5(G).

26. IND. APP. R. 31.

27. IND. APP. R. 33.

28. IND. APP. R. 34(F).

29. IND. APP. R. 49-51.

30. Letter from Carol Sparks Drake, Indiana State Bar Association Appellate Practice Section Chair, to Lilia G. Judson, Executive Secretary, Indiana Supreme Court Committee on Rules of Practice and Procedure 1 (May 12, 2004) (on file with author) [hereinafter Drake Letter].

court clerk shall retain the Clerk's Record throughout the appeal. A party may request that the trial court clerk copy the Clerk's Record, and the clerk shall provide the copies within thirty (30) days, subject to the payment of any usual and customary copying charges.³¹

This proposal arose from comments voiced by "practitioners and court clerks regarding continuing confusion over whether the clerk can charge for copies of the Clerk's Record."³²

2. *Appellate Rule 34(C)*.—The Appellate Practice Section proposes changing the time for filing a response to non-routine motions from ten to fifteen days, and therefore proposes amending Rule 34(C) in the following manner: "C. Response. Any party may file a response to a motion within ~~ten (10)~~ fifteen (15) days after the motion is served."³³ The Appellate Practice Section finds this change necessary because: (1) other responsive deadlines in the Appellate Rules are at least fifteen days; therefore, the ten-day response time "potentially serves as a trap for the occasional appellate practitioner;" and (2) ten days is insufficient because "the motions covered by [Rule 34(C)] often involve significant questions of jurisdiction or factual issues."³⁴

3. *Appellate Rule 44*.—The Appellate Practice Section proposes changing Rule 44 as it relates to the length of intervenor and amicus briefs/petitions on transfer or rehearing and the length of reply briefs in response to a petition to transfer.³⁵ Concerning the former, the Appellate Practice Section finds it inequitable that intervenors and amicus receive fifteen pages or 7000 words when submitting a brief or petition regarding transfer or rehearing while the parties themselves are limited to ten pages or 4200 words.³⁶ Concerning the latter, the Appellate Practice Section asserts the transfer reply brief limitation of three pages or 1000 words is too low.³⁷ Accordingly, it proposes the following changes to subsections (D) and (E) of Rule 44:

D. Page Limits. Unless a word count complying with Section E is provided, a brief or Petition may not exceed the following number of pages:

...

Brief of intervenor or amicus curiae (except as provided below):
fifteen (15) pages

...

31. *Id.* at 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* IND. APP. R. 44(E).

36. Drake Letter, *supra* note 30, at 2.

37. *Id.*

Reply brief to brief in response to a Petition seeking Transfer or Review: ~~three (3)~~ five (5) pages

Brief of intervenor or amicus curiae on transfer or rehearing: seven (7) pages

...

E. Word Limits. A brief or Petition exceeding the page limit of Section D may be filed if it does not exceed, and the attorney or the unrepresented party preparing the brief or Petition certifies that, including footnotes, it does not exceed, the following number of words:

...

Brief of intervenor or amicus curiae (except as provided below): 7,000 words

...

Reply brief to brief in response to a Petition seeking Transfer or Review: ~~1,000~~ 1,500 words

Brief of intervenor or amicus curiae on transfer or rehearing: 3,000 words³⁸

4. *Appellate Rule 50*.—Finally, the Appellate Practice Section proposes changing Rule 50 concerning Appendices. First, it notes that the Rule does not explicitly require counsel to serve the Appendix on opposing parties and believes the parties should be required to do so.³⁹ Second, it notes comments made by several practitioners that some of the documents required in the Appendix in criminal cases may be irrelevant.⁴⁰ Accordingly, the Appellate Practice Section proposes the following changes to Rule 50:

B. Appendices in Criminal Appeals

(1) Contents of Appellant's Appendix. The appellant's Appendix

38. *Id.* at 2-3.

39. *Id.* at 3. The question of whether service of an Appendix on opposing counsel in criminal cases is necessary or desirable, at least where the State is the appellee, seems already to have been considered by the supreme court. In *Theobald v. Hartford Casualty Insurance Co.*, 762 N.E.2d 785, 786 (Ind. Ct. App. 2002), the court of appeals wrote "that the Supreme Court of Indiana by an order issued by that court on September 24, 2001, has provided that in criminal appeals, copying of the Appendix and service thereof serves no useful purpose and that the Attorney General's Office is in a position to simply 'check out' the Appendix from the Clerk's Office in the same manner as it currently checks out the transcript."

40. Drake Letter, *supra* note 30, at 3.

in a Criminal Appeal shall contain a table of contents and copies of the following documents, if they exist:

(a) the Clerk's Record, including the chronological case summary but excluding notices of depositions, motions for extensions of time, notices of settings, subpoenas, documents related solely to the attendance of witnesses or the defendant, documents related to the selection of jurors, and orders related to such matters, unless such documents relate to an issue on appeal;

...

F. Certificate of Service. The Appendix shall be served pursuant to Rule 24. In pauper cases or for good cause shown, the court may, upon motion, relieve the party of the service requirement.⁴¹

The Rules Committee will consider these suggestions in due course and may ultimately make recommendations to the supreme court in accordance with the timetables and procedure of Indiana Trial Rule 80.

II. DEVELOPMENTS IN THE CASE LAW

A. *Supreme Court Clarifies Proper Procedure for Correcting Sentencing Errors*

An erroneous criminal sentence can be corrected through a motion to correct error under Trial Rule 59, through a direct appeal under Appellate Rule 9(A), or through an appropriate petition for post-conviction relief under Indiana Post-Conviction Rule 1, section 1(a)(3).⁴² In addition, Indiana Code section 35-38-1-15 permits a person erroneously sentenced to file a "motion to correct sentence."⁴³ During the survey period, the Indiana Supreme Court in *Robinson v. State*⁴⁴ clarified the circumstances under which erroneous sentences should be corrected through a motion to correct sentence verses the other, more traditional means. Specifically, it held:

[A] motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.⁴⁵

Claims requiring consideration of matters outside the face of the sentencing

41. *Id.* at 3-4.

42. *See Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004).

43. IND. CODE § 35-38-1-15 (2004).

44. 805 N.E.2d 783.

45. *Id.* at 787.

judgment, it held, "are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable."⁴⁶

In so holding, the court expressly disapproved prior precedent in which it had considered motions to correct sentences that required review of matters outside the face of the sentencing judgment.⁴⁷ *Robinson* also held that because motions to correct sentences "based on clear facial error are not in the nature of post-conviction petitions, . . . they may . . . be filed after a post-conviction proceeding without seeking the prior authorization necessary for successive petitions for post-conviction relief under Indiana Post-Conviction Rule 1(12)," expressly overruling prior court of appeals precedent to the contrary.⁴⁸

B. Failure to Request Transcript Not Necessarily Fatal to Appeal

Appellate Rule 9(F)(4) states in relevant part:

The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.⁴⁹

Does Appellate Rule 9(F)(4) require the appellant to request preparation of a trial transcript in all circumstances? Not always, according to *Pabey v. Pastrick*.⁵⁰ In *Pabey* an election fraud case, the appellant did not request preparation of a transcript. The court of appeals summarily dismissed his appeal. On transfer, the appellee defended the dismissal by contending Appellate Rule 9(F)(4) requires the appellant to present a complete record, including a transcript, which the appellant failed to do. The appellant countered that Appellate Rule 9(F) makes the transcript mandatory only when the appellant challenges a finding of fact or claims a conclusion based thereon is unsupported by the evidence or is contrary to the evidence. Because *Pabey* was not making such claims and his specifications of error did not rely on evidence outside the court's findings, he contended the transcript was unnecessary.⁵¹

The specific holding in *Pabey* was that "[e]ven if Appellate Rule 9(F)(4) required *Pabey* to submit a transcript, dismissal with prejudice was not the appropriate remedy for his noncompliance with the rule."⁵² The opinion did not specifically approve *Pabey*'s argument (although it suggested his argument found support in prior precedent applying the predecessor to our current appellate

46. *Id.*

47. *Id.* at 786-87 (disapproving *Mitchell v. State*, 726 N.E.2d 1228, 1243 (Ind. 2000); *Reffett v. State*, 571 N.E.2d 1227, 1228-29 (Ind. 1991); *Jones v. State*, 544 N.E.2d 492, 496 (Ind. 1989)).

48. *Id.* at 788 (overruling *White v. State*, 793 N.E.2d 1127, 1132 (Ind. Ct. App. 2003); *Waters v. State*, 703 N.E.2d 688, 689 (Ind. Ct. App. 1998)).

49. IND. APP. R. 9(F)(4).

50. 816 N.E.2d 1138 (Ind. 2004).

51. *Id.* at 1142.

52. *Id.*

rules),⁵³ and therefore probably cannot be cited as an affirmative holding that Appellate Rule 9(F)(4) does not require submission of the transcript when the appellant is not challenging a finding of fact or claiming a conclusion based thereon is unsupported by the evidence or is contrary to the evidence. However, the opinion certainly supports such a notion in both its discussion of prior precedent and the fact that the court did not order Pabey to go back and cause a transcript to be prepared (which was presented as an alternative to dismissal in the appellee's Response To Appellant's Petition To Transfer).⁵⁴

*C. Failure to Seek Order Compelling Completion of Clerk's Record
Not Fatal Where Appellee Not Prejudiced and Failure Did
Not Result in Long Delay*

Within thirty days after the filing of a Notice of Appeal, the trial court clerk or administrative agency is required to assemble the Clerk's Record and serve a Notice of Completion of Clerk's Record ("Notice of Completion").⁵⁵ If the trial court clerk or administrative agency fails to do so, then the appellant, within fifteen days after the Notice of Completion was due, must "seek an order from the Court on Appeal compelling the trial court clerk or Administrative Agency to . . . issue, file, and serve its Notice of Completion."⁵⁶ According to Appellate Rule 10, the appellant's failure to do so "shall subject the appeal to dismissal."⁵⁷

In *State v. Moore*,⁵⁸ the clerk did not file the Notice of Completion within thirty days after the Notice of Appeal was filed, and the State did not seek an order compelling the issuance of the Notice of Completion within fifteen days thereafter.⁵⁹ However, on the sixteenth day after the Notice of Completion deadline, the trial court clerk provided the Notice of Completion without any order compelling such action.⁶⁰ In ruling on the appellee's motion to dismiss, the court acknowledged Appellate Rule 10 could "be read to state that an appeal must be dismissed if an appellant fails to seek an order of the appellate court to compel a trial court clerk to complete the clerk's record."⁶¹ However, it declined to do so, finding such a reading would not "coincide[] with the preference that [the court] apply an ameliorative approach to remedy failures by the parties to provide a complete record upon appeal."⁶² Finding neither prejudice to the appellee nor a "long delay . . . result[ing] from the State's failure to take action," the court declined to dismiss the appeal.⁶³ In doing so, however, the court

53. *Id.* (discussing *In re Walker*, 665 N.E.2d 586, 588 (Ind. 1996)).

54. *Id.*

55. IND. APP. R. 10(B), (C).

56. IND. APP. R. 10(F).

57. *Id.*

58. 796 N.E.2d 764 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 791 (Ind. 2004).

59. *Id.* at 766.

60. *Id.*

61. *Id.*

62. *Id.* (citing *Johnson v. State*, 756 N.E.2d 965, 967 (Ind. 2001)).

63. *Id.* at 767.

"caution[ed] . . . [that] [h]ad a long delay resulted because of the State's failure to act, dismissal may have been warranted."⁶⁴

D. Interlocutory Appeals

During the survey period, the court of appeals issued some important decisions interpreting the parameters and limits of interlocutory appeals.

1. *Order to Produce Documents Does Not Give Rise to Interlocutory Appeal, Even if Would Cost \$12 Million.*—In *Allstate Insurance Co. v. Scrogan*,⁶⁵ Allstate sought interlocutory appeal of a discovery order requiring it to produce documents that, Allstate claimed, would cost it approximately \$12 million to produce.⁶⁶ The court of appeals dismissed the appeal for lack of jurisdiction. First, it determined Appellate Rule 14(A)(1)⁶⁷ did not apply because the order "[did] not pertain directly to the payment of money,"⁶⁸ and Appellate Rule 14(A)(3)⁶⁹ did not apply, because the delivery of documents under the order did not "import[] a surrender."⁷⁰ Second, it found that, although *State v. Hogan*⁷¹ states, "[t]he matters which are appealable as of right under Appellate Rule 4(B)(1)⁷² involve the trial court orders which carry financial and legal consequences akin to those more typically found in final judgments," that language simply "categorizes those orders that already are appealable as of right under the rule" rather than creating "a new exception" for appeals as a matter of right.⁷³ Third, the court declined to follow previous cases that "suggest[ed] the court of appeals] may find jurisdiction to hear an interlocutory appeal outside of Rule 14,"⁷⁴ ruling that the only bases for interlocutory appeals are found in Rule 14.⁷⁵

64. *Id.*

65. 801 N.E.2d 191 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

66. *Id.* at 192.

67. Appellate Rule 14(A)(1) gives the court of appeals jurisdiction over appeals of interlocutory orders compelling "the payment of money." IND. APP. R. 14(A)(1).

68. *Scrogan*, 801 N.E.2d at 192; *see also id.* at 194.

69. Appellate Rule 14(A)(3) gives the court of appeals jurisdiction over appeals of interlocutory orders compelling "the delivery or assignment of any securities, evidence of debt, documents, or things in action." IND. APP. R. 14(A)(3).

70. *Scrogan*, 801 N.E.2d at 192, 194.

71. 582 N.E.2d 824 (Ind. 1991). In *Hogan*, the supreme court "held that discovery orders involving the production of documents were not appealable as of right but only as discretionary interlocutory appeals, which require certification by the trial court and acceptance by the court of appeals." *Scrogan*, 801 N.E.2d at 194 (discussing *Hogan*, 582 N.E.2d at 825).

72. Appellate Rule 4(B)(1) was the predecessor to what is now Appellate Rule 14(A).

73. *Scrogan*, 801 N.E.2d at 195 (quoting *Hogan*, 582 N.E.2d at 825 (emphasis in *Scrogan*)).

74. *Id.* (citing *Nass v. State ex rel. Unity Team*, 718 N.E.2d 757 (Ind. Ct. App. 1999); *Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339 (Ind. Ct. App. 1998)).

75. *Id.* at 195-96 (following *INB Nat'l Bank v. 1st Source Bank*, 567 N.E.2d 1200, 1202 (Ind. Ct. App. 1991)). *See also* *Young v. Estate of Sweeney*, 808 N.E.2d 1217, 1219 (Ind. Ct. App.

2. *Trial Court's Incorrect Designation of Order Denying Partial Summary Judgment as a "Final Appealable Judgment" Is Not Binding on Court of Appeals.*—In *Cardiology Associates of Northwest Indiana, P.C. v. Collins*,⁷⁶ the trial court incorrectly wrote at the end of its order denying a motion for partial summary judgment and subsequent motion to correct errors, "[t]he Court further finds no just reason for delay, and hereby enters this Order . . . as [a] final and appealable judgment."⁷⁷ The court of appeals dismissed the appeal sua sponte because an order denying a motion for summary judgment is not a "final appealable order" and "the parties did not follow the proper procedure for bringing an interlocutory appeal."⁷⁸

3. *Error in Interlocutory Order Can Be Raised on Appeal from Final Judgment.*—Last year this article stated the supreme court's grant of transfer in *Bojrab v. Bojrab*⁷⁹ provided the court "the opportunity to give a final and definitive answer to the question of waiver in interlocutory orders that qualify as appealable of right pursuant to Appellate Rule 14(A)."⁸⁰ The court lived up to its billing, conclusively holding that "[a] claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal from the final judgment."⁸¹

4. *Court of Appeals Certifies Interlocutory "Orders," Not Interlocutory "Issues."*—In *Infectious Disease of Indianapolis, P.S.C. v. Toney*,⁸² the court of appeals clarified that when a trial court certifies a matter for interlocutory appeal under Appellate Rule 14(B), it is certifying *its interlocutory order* for review by the court of appeals, rather than certifying a particular question that the trial court wants the court of appeals to answer.⁸³ "[T]here is nothing prohibiting the trial court from identifying the specific question of law presented by its order," the court noted, but the appellate court "is under no obligation to accept the issue as framed by the trial court or to answer it."⁸⁴

5. *CHINS Permanency Plan Order Not "Final Appealable Order."*—Finally, in *In re K.F.*,⁸⁵ the court of appeals dismissed an interlocutory appeal sua sponte involving a permanency plan order made pursuant to CHINS action, finding it was not a "final appealable order" because it did dispose of all claims

2004) (dismissing interlocutory appeal sua sponte for lack of subject matter jurisdiction because the appeal failed to satisfy Appellate Rule 14, stating, "[o]ur Rules of Appellate Procedure provide that we have jurisdiction over interlocutory orders only under the conditions described in Appellate Rule 14").

76. 804 N.E.2d 151 (Ind. Ct. App. 2004).

77. *Id.* at 153.

78. *Id.* at 154-55 (citing IND. APP. R. 14).

79. 786 N.E.2d 713 (Ind. Ct. App. 2003), *vacated on grant of trans.*

80. See Cressler 2004, *supra* note 1, at 925.

81. *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004).

82. 813 N.E.2d 1223 (Ind. Ct. App. 2004).

83. *Id.* at 1227 n.4.

84. *Id.*

85. 797 N.E.2d 310 (Ind. Ct. App. 2003).

as to all parties.⁸⁶

E. Waiver

During the survey period, Indiana's appellate courts considered many important issues involving the proper preservation of issues for appeal.

1. *New Appellate Rule 5 Does Not Require Potential Litigants to Intervene in Utility Regulatory Administrative Proceedings to Preserve Appellate Arguments.*—In 1991, the supreme court interpreted Indiana Code section 8-1-3-1⁸⁷ to permit litigants appealing an Indiana Utility Regulatory Commission decision, who were not parties below, to raise issues before the court of appeals that were not raised before the Commission.⁸⁸ In *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Co.*,⁸⁹ the defendant ("NIPSCO") argued that the new Appellate Rule 5, which went into effect January 1, 2001, overrides the supreme court's previous interpretation of section 8-1-3-1 because the rule expressly states, "[a]ll issues and grounds for appeal appropriately preserved before an Administrative Agency may be initially addressed in the appellate brief."⁹⁰ The court of appeals rejected NIPSCO's argument, distinguishing cases in which a party appealing the Commission's decision, were found to have failed to "sufficiently preserve[]" an issue by raising it before the Commission because in those cases the parties had been involved at the administrative stage.⁹¹

2. *Contemporaneous Objection to Instruction When Jury Charged Is Unnecessary if Previous "Informal" Objection Made.*—Failure to object to a jury instruction before the jury retires waives any claim of error based on that

86. *Id.* at 315.

87. IND. CODE § 8-1-3-1 (2004) states:

Any person, firm, association, corporation, limited liability company, city, town, or public utility adversely affected by any final decision, ruling, or order of the [Indiana Utility Regulatory Commission] may, within thirty (30) days from the date of entry of such decision, ruling, or order, appeal to the court of appeals of Indiana for errors of law under the same terms and conditions as govern appeals in ordinary civil actions, except as otherwise provided in this chapter and with the right in the losing party or parties in the court of appeals to apply to the supreme court for a petition to transfer the cause to said supreme court as in other cases. An assignment of errors that the decision, ruling, or order of the commission is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the finding of facts upon which it was rendered.

88. See *Citizens Action Coalition of Ind. Inc. v. N. Ind. Pub. Serv. Co.*, 804 N.E.2d 289, 295-96 (Ind. Ct. App. 2004) (discussing *Citizens Action Coalition of Ind., Inc. v. Pub. Serv. Co. of Ind.*, 582 N.E.2d 330, 334 (Ind. 1991)).

89. *Id.*

90. *Id.* (quoting IND. APP. R. 5(C)(2) (emphasis added)).

91. See *id.* at 296-97.

instruction.⁹² In *Wohlwend v. Edwards*,⁹³ the appellant “did not formally record his objection until after the jury had been charged;” however, he had objected to the instruction “earlier off the record, ‘in accordance with customary practice in courts across Indiana.’”⁹⁴ Noting that such a “practice was given tacit approval” by the court of appeals in 1980⁹⁵ and that the record supported the appellant’s contention that the objection had been previously made but not formally recorded until later, the court of appeals held the appellant had preserved his claim of error concerning the instruction.⁹⁶

3. *Express Citation to Foreign Statutory Scheme Not Necessary to Preserve Issue When Applicability of Foreign Law Was “Part And Parcel” of Plaintiff’s Claim.*—In *United Farm Family Mutual Insurance Co. v. Michalski*,⁹⁷ the plaintiffs/appellees brought a replevin action against a theft victim’s property insurer to recover possession of a boat titled in the name of one of the plaintiffs after the boat was sold to foreclose a storage lien.⁹⁸ A necessary part of the plaintiffs’ claim was establishing they had acquired a lien pursuant to Illinois law and had complied with the requirements of the Illinois Labor and Storage Lien (Small Amount) Act (“the Act”) to enforce the lien.⁹⁹ The plaintiffs never specifically referred to the Act before the trial court, however. The court of appeals refused to find the plaintiffs waived their claim by failing to cite the Act specifically, because “the issue of [the plaintiffs’] lien pursuant to Illinois law . . . was . . . before the [trial] court as part and parcel of their claim for replevin,” and because opposing counsel had specifically cross-examined a witness in a manner apparently designed for “no other reason . . . [than] to cast doubt on [the plaintiffs’] claim of a lien under Illinois law and the use of that lien to obtain their purported superior title to [the boat].”¹⁰⁰

4. *Issues Considered on Appeal That Were Not Raised in Trial Court.*—“A party generally waives appellate review of an issue or argument unless that party presented that issue or argument before the trial court.”¹⁰¹ During the survey period, the court of appeals noted two exceptions to this general rule.

92. IND. TRIAL R. 51(C).

93. 796 N.E.2d 781 (Ind. Ct. App. 2003).

94. *Id.* at 790 (quoting Appellant’s Reply Br. at 8).

95. *Id.* at 790-91 (discussing *Manning v. Allgood*, 412 N.E.2d 811 (Ind. Ct. App. 1980); *Piwowar v. Wash. Lumber & Coal Co.*, 405 N.E.2d 576 (Ind. Ct. App. 1980)).

96. *Id.* at 791.

97. 814 N.E.2d 1060 (Ind. Ct. App. 2004).

98. *Id.* at 1062-63.

99. *Id.* at 1066.

100. *Id.* at 1067. Further, the court of appeals held that the plaintiffs’ failure to give notice of their intent to rely on foreign law, as required by the Uniform Judicial Notice of Foreign law Act, Indiana Code chapter 34-38-4, did not result in waiver for the same reasons. *Id.* at 1066.

101. *Dedelow v. Pucalik*, 801 N.E.2d 178, 183 (Ind. Ct. App. 2003) (citing *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 652 (Ind. Ct. App. 2002)); *see also* *Midwestern Indem. Co. v. Sys. Builders, Inc.*, 801 N.E.2d 661, 671 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 804 (Ind. 2004).

In *Dedelow v. Pucalik*,¹⁰² the court of appeals held that if the trial court rules on an issue the parties themselves overlooked and did not argue below, then the parties are not precluded from addressing that issue on appeal.¹⁰³ As the court of appeals observed, “were we to apply waiver to [such a situation], the aggrieved party would be unable to challenge the judgment upon appeal, effectively insulating the victorious party.”¹⁰⁴

In *Midwestern Indemnity Co. v. Systems Builders, Inc.*,¹⁰⁵ the defendant/appellee moved for summary judgment based on certain arguments, but on appeal attempted to advance a different argument in support of the trial court’s summary judgment decision.¹⁰⁶ Although “[f]ailure to make a claim or argument to the trial court ordinarily precludes making it on appeal,”¹⁰⁷ the court of appeals considered the otherwise waived argument in part because the appellant “did not, in its reply brief, challenge [the appellee’s] expansion of its . . . argument.”¹⁰⁸ In contrast, the appellant in *McGill v. Ling*¹⁰⁹ was not so fortunate. She failed to present a statute of limitations tolling argument during summary judgment proceedings, but attempted to make the argument on appeal.¹¹⁰ She contended the matter was not waived because “matters designated to the trial court at summary judgment contained facts underlying the . . . tolling issue.”¹¹¹ The court of appeals rejected her argument, noting, “[i]f we were to adopt McGill’s assertion that a party does not waive a new argument raised for the first time on appeal simply because there are facts in the summary judgment record to support that argument, that would create an exception which swallows the waiver rule.”¹¹²

5. “*Mootness*” Cannot Be Waived by Failing to Raise It Below.—The appellees in *Sherrell v. Northern Community School Corp.*,¹¹³ a school expulsion case, argued the case was moot because the student’s expulsion “ha[d] long since

102. 801 N.E.2d 178.

103. *Id.* at 184-85.

104. *Id.* at 185 n.6.

105. 801 N.E.2d at 661.

106. *Id.* at 671.

107. *Id.*

108. *Id.*

109. 801 N.E.2d 678 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

110. *Id.* at 687.

111. *Id.*

112. *Id.* at 688. *See also* *Westfield Cos. v. Knapp*, 804 N.E.2d 1270, 1276 n.10 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 975 (Ind. 2004) (setting forth facts supporting argument in “Facts and Procedural History” section of summary judgment brief, without making argument directly in “Argument” section of brief, does not bring that matter to trial court’s attention sufficient to preserve argument on appeal); *Johnson v. Parkview Health Sys., Inc.*, 801 N.E.2d 1281, 1287-88 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 804 (Ind. 2004) (claim under Medical Malpractice Act waived on appeal when only theory of recovery advanced in trial court was under Child Wrongful Death Statute).

113. 801 N.E.2d 693 (Ind. Ct. App. 2004).

ended.”¹¹⁴ The appellant responded by asserting the appellees had failed to raise the mootness issue before the trial court and therefore had waived that claim on appeal. The court of appeals responded by “observ[ing] that ‘the determination of mootness is not a matter which can be waived.’”¹¹⁵ Rather, “[i]t is the prerogative of [the court of appeals] to determine whether to address an issue when [it is] informed that the matter is no longer live or has become moot as between the parties.”¹¹⁶

6. *Failure to Object to Admission of Parol Evidence Does Not Result in Waiver.*—In *Krieg v. Hieber*,¹¹⁷ the appellant contended the appellee waived his ability to make a parol evidence argument on appeal by failing to object to the admission of the evidence at trial.¹¹⁸ The court of appeals disagreed, citing precedent from the 1980s for the proposition that “[t]he parol evidence rule is a rule of preference and of substantive law’ which prohibits both the trial court and appellate court from considering such evidence even though it was admitted to trial without objection.”¹¹⁹

7. *Mere Listing of Contention in Complaint Insufficient to Preserve Issue for Appeal.*—In *Endres v. Indiana State Police*,¹²⁰ the appellant had listed certain constitutional claims in his complaint, but the first arguments he made in support of those contentions were in a motion to correct errors.¹²¹ Citing “notice pleading,” the court of appeals determined the issue was sufficiently preserved for appellate consideration.¹²² In a per curiam opinion, the supreme court disagreed, stating:

We find that the mere listing of a contention in a party’s complaint, with no further attempt to press the contention in the trial court, is insufficient effort to preserve the matter for appellate review. At a minimum, a party must show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal. The policy reasons behind this requirement—preservation of judicial resources, opportunity for full development of the record, utilization of trial court fact-finding expertise, and assurance of a claim being tested by the adversary process—apply with particular force where, as here, the claim is a constitutional one. We therefore decline to address this issue because the record and arguments have not been sufficiently developed

114. *Id.* at 701.

115. *Id.* (internal citations omitted).

116. *Id.* (internal citations omitted).

117. 802 N.E.2d 938 (Ind. Ct. App. 2004).

118. *Id.* at 943 n.2.

119. *Id.* (quoting *Hancock v. Ky. Cent. Life Ins. Co.*, 527 N.E.2d 720, 725 (Ind. Ct. App. 1988) (quoting *Franklin v. White*, 493 N.E.2d 161, 165-66 (Ind. 1986))).

120. 809 N.E.2d 320 (Ind.) (per curiam), *aff’d in part, vacated in part*, 809 N.E.2d 320 (Ind. 2004).

121. *Id.* at 321-22.

122. *Id.* at 322.

for us to decide this important issue of Indiana constitutional law.¹²³

8. *Failure to Assist Trial Court with Wording of Jury Admonishment Waives Ability to Challenge the Admonishment.*—In *Strack & Van Til, Inc. v. Carter*,¹²⁴ the appellant challenged the effectiveness of a trial court's sua sponte jury admonishment concerning the limited purpose for which the jury should consider a particular piece of photographic evidence.¹²⁵ The court of appeals held the appellant could not now challenge the content of the admonishment because the trial court had asked appellant's counsel to assist it with the admonishment's wording but counsel chose not to do so.¹²⁶

9. *Invited Error Doctrine.*—

a. *Invited error waives subject matter jurisdiction issue on appeal.*—In *Batterman v. Bender*,¹²⁷ Father filed a motion for modification of a Wisconsin child support order in the Knox Circuit Court after Mother and Child moved from Wisconsin to Indiana.¹²⁸ Things did not go as Father had hoped, as under Indiana law he ended up having his support obligations increased, not decreased.¹²⁹ On appeal, Father argued the action had to be dismissed for lack of subject matter jurisdiction because he had failed to register the Wisconsin child support order as required by Indiana law.¹³⁰ Citing the “invited error” doctrine,¹³¹ the court of appeals rejected his argument, finding “the filing of the Wisconsin order was entirely in the hands of [Father], and any problem with the registration of the order is directly attributable to him.”¹³²

b. *Defense counsel's sentencing recommendation did constitute invited error when defendant himself objected to the recommendation during his testimony.*—In *Chism v. State*,¹³³ defense counsel proposed Chism be placed on GPS monitoring and, consequently, did not object to GPS monitoring during the sentencing hearing.¹³⁴ Accordingly, the State, citing the “invited error” doctrine, argued Chism could not contest the GPS monitoring portion of his sentence on appeal.¹³⁵ The court of appeals rejected the State's argument and found the issue viable on appeal because despite defense counsel's proposal, Chism himself had

123. *Id.* (internal citations omitted) (citing *Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000); *Chidester v. City of Hobart*, 631 N.E.2d 908, 913 (Ind. 1994)).

124. 803 N.E.2d 666 (Ind. Ct. App. 2004).

125. *Id.* at 673.

126. *Id.*

127. 809 N.E.2d 410 (Ind. Ct. App. 2004).

128. *Id.* at 411.

129. *Id.* at 411-12.

130. *See id.* at 412 (discussing Interstate Family Support Act, IND. CODE § 31-18-6-11).

131. *Id.* Under the “invited error doctrine,” an appellate court will not review trial court error the party asserting the error has committed, invited, or that was the natural consequence of his own neglect or misconduct.

132. *Id.* at 413.

133. 813 N.E.2d 402 (Ind. Ct. App. 2004), *vacated by* 824 N.E.2d 334 (Ind. 2005).

134. *Id.* at 408 n.1.

135. *Id.*

objected to GPS monitoring during his testimony.¹³⁶

F. Jurisdiction

During the survey period, the court of appeals provided further guidance in the oft-confusing area of trial versus appellate court jurisdiction.

1. *Trial Court's Order Not Void for Lack of Jurisdiction, Even Though Petition to Modify Child Support Was Filed Before Case Was Certified Back to Trial Court from Supreme Court, Because Trial Court Did Not Act on Petition Until After Certification.*—In *Harris v. Harris*,¹³⁷ a marital dissolution appeal, Husband filed a Petition to Transfer on November 29, 2000. While his transfer petition was pending, on April 10, 2001, Husband filed in the trial court a Supplemental Petition to Modify Child Support (“Supplemental Petition”). On April 11, 2001, the supreme court denied transfer and on April 16, 2001, certified the case back to the trial court. Thereafter, the trial court conducted an evidentiary hearing on Husband’s Supplemental Petition, after which the court modified Husband’s support obligations.¹³⁸ Wife appealed, arguing inter alia that the trial court’s modification order was “void” for lack of jurisdiction because the Supplemental Petition on which it was based had been filed while Husband’s transfer petition remained pending.¹³⁹ The court of appeals rejected Wife’s argument. Although it acknowledged that “once an appeal is perfected, the trial court is divested of jurisdiction to alter or amend the judgment,”¹⁴⁰ the court found the jurisdictional defect “cured” by the trial court’s inaction on the Supplemental Petition until after the supreme court had denied transfer and certified the case back to the trial court.¹⁴¹ Also important was the fact that Wife had failed to demonstrate how the Supplemental Petition’s premature filing prejudiced her.¹⁴²

2. *When Is a Final Judgment “Entered” for Purposes of Appellate Rule 9(A)?*—In *Schaefer v. Kumar*,¹⁴³ the court of appeals indirectly touched on another interesting procedural issue concerning when a final judgment is “entered” for purposes of the thirty-day deadlines expressed in Appellate Rule

136. *Id.* The Indiana Supreme Court’s opinion on transfer did not address the “invited error” issue. See generally *Chism*, 824 N.E.2d 334.

137. 800 N.E.2d 930, 935-37 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 798 (Ind. 2004).

138. *Id.*

139. *Id.* at 935.

140. *Id.* at 936 (citing *Elbert v. Elbert*, 579 N.E.2d 102, 114 (Ind. Ct. App. 1991)).

141. *Id.* at 937.

142. *Id.* (citing *Haverstick v. Banat*, 331 N.E.2d 791, 794 (Ind. Ct. App. 1975)). However, the court did reverse the portion of the trial court’s order requiring retroactive support modification to the file date of the Supplemental Petition, stating the date on which the supreme court certified the case back to the trial court was the earliest date to which the trial court could order retroactive modification. To hold otherwise, the court wrote, “would be to validate without qualification” the defect caused by the premature filing of the Supplemental Petition. *Id.*

143. 804 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

9(A).¹⁴⁴ The Notice of Appeal was filed on March 20, 2002, twelve days *after* the summary judgment hearing at which the trial court “indicated [it] was going to grant summary judgment in favor of [the appellee]”¹⁴⁵ and the judgment was entered on court’s chronological case summary (“CCS”), but twelve days *before* the trial court actually signed and filed its order granting summary judgment.¹⁴⁶ The court of appeals ruled the Notice of Appeal was not premature because the judgment had been entered on the court’s CCS prior to the filing of the Notice of Appeal. In other words, the court of appeals appears to have found the final judgment was “entered” for purposes of Appellate Rule 9(A) when the trial court entered the judgment on its CCS, rather than when the court’s written order was signed and filed. Such a determination may comport with prior precedent stating the trial court officially “speaks” through its order book, docket, or CCS.¹⁴⁷ However, if the appellant had calculated his thirty days from the file-stamp date appearing on the court’s written order, rather than the date on which the court entered the judgment on the CCS, would his appeal therefore have been untimely? Interesting question.

3. *Court Interprets Appeal Bond Provision of Indiana Code Section 32-24-1-8.*—Finally, in *Lake County Parks & Recreation Board v. Indiana-American Water Co.*,¹⁴⁸ the court of appeals interpreted Indiana Code section 32-24-1-8 concerning the filing of an appeal bond. Section 32-24-1-8

provides in relevant part that if the objections to a complaint in condemnation are overruled, a defendant “may appeal the interlocutory order overruling the objections and appointing appraisers in the manner that appeals are taken from final judgments in civil actions upon filing with the circuit court clerk a bond. . . . The appeal bond must be filed not later than ten (10) days after the appointment of the appraisers.”¹⁴⁹

The appellee sought to have the appeal dismissed for lack of jurisdiction because the appellant had not filed an appeal bond within ten days after the appointment of appraisers. The court of appeals declined, noting the trial court had failed to set a bond amount when it issued its order overruling the Board’s objections; the appellant had filed, within the ten-day period, a motion to waive the bond or set the matter for a hearing to determine the bond; and the appellant had later posted

144. Appellate Rule 9(A) provides that to initiate an appeal, the appellant must file a Notice of Appeal with the trial court clerk within thirty days: (1) “after the entry of a Final Judgment”; or (2) after the trial court rules upon a Motion To Correct Error or such motion is “deemed denied under Trial Rule 53.3.” IND. APP. R. 9(A).

145. *Schaefer*, 804 N.E.2d at 189 n.7.

146. *Id.*

147. See, e.g., *State ex rel. Sargent v. Vigo Superior Court*, 296 N.E.2d 785, 787 (Ind. 1973); *Woolley v. Washington Township Marion County Small Claims Court*, 804 N.E.2d 761, 766 (Ind. Ct. App. 2004); *Young v. State*, 765 N.E.2d 673, 681 n.6 (Ind. Ct. App. 2002); *State v. Suggs*, 755 N.E.2d 1099, 1103 n.4 (Ind. Ct. App. 2001); *Staples v. State*, 553 N.E.2d 141, 143 (Ind. Ct. App. 1990).

148. 812 N.E.2d 1118 (Ind. Ct. App. 2004).

149. *Id.* at 1121-22 n.2 (quoting IND. CODE § 32-4-1-8 (2004)).

the bond “in a timely manner” after the trial court set the bond amount.¹⁵⁰

G. “Law of the Case” Doctrine

“The law of the case doctrine is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially similar facts.”¹⁵¹ During the survey period, the court of appeals issued some notable decisions involving the “law of the case” doctrine.

1. *Motions Panel’s Denial of Motion to Dismiss Not Necessarily “Law of the Case” When Basis for Ruling Unclear.*—In *Rosby Corp. v. Townsend, Yosha, Cline & Price*,¹⁵² the appellant argued the doctrine prevented the appellee from asserting the applicability of a certain key precedent because the court’s motions panel, in a prior appeal of the case, had rejected a motion to dismiss filed by the appellees premised on that particular key precedent.¹⁵³ The court of appeals rejected the appellant’s claim, primarily because the appellant failed to provide the court with a copy of the appellee’s previous motion to dismiss. “[T]o invoke the law of the case doctrine,” the court stated, “the matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion, and questions not conclusively decided in the prior appeal do not become the law of the case.”¹⁵⁴ Without the ability to review the appellee’s previous motion to dismiss, the court was “unable to review the nature of the claim that was made in it.”¹⁵⁵ Further, even if the issue had been raised in the previous motion, the motion panel’s order “simply refused to grant relief” and was “unclear on [its] face . . . whether the issue was conclusively litigated and decided.”¹⁵⁶

2. *“Law of the Case” Doctrine Prevents Submission of New Evidence on Remand When Remand Order Makes Definitive Ruling.*—In *American Family Mutual Insurance Co. v. Federated Mutual Insurance Co.*,¹⁵⁷ the court of appeals addressed the applicability of the “law of the case” doctrine to a party’s attempt to introduce new evidence in the trial court after remand by the court of appeals. In the first appeal, the court of appeals reversed an award of summary judgment in favor of the appellee, ordered the appellee to “honor its policy of insurance and provide uninsured motorist coverage to [Patricia and Daniel Brown],” and remanded the case “for proceedings not inconsistent with this opinion.”¹⁵⁸ On remand, the appellee filed a document, which had not been filed when the case

150. *Id.*

151. *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 664 (Ind. Ct. App. 2003) (citing *Learman v. Auto-Owners Ins. Co.*, 769 N.E.2d 1171, 1175 (Ind. Ct. App. 2002), *trans. denied*, 812 N.E.2d 801 (Ind. 2004)).

152. *Id.* at 661.

153. *See id.* at 664.

154. *Id.*

155. *Id.*

156. *Id.*

157. 800 N.E.2d 1015 (Ind. Ct. App. 2004).

158. *Id.* at 1018.

initially was before the trial court, arguably showing uninsured motorist coverage had been waived.¹⁵⁹ Based on this new evidence, the trial court again granted summary judgment to the appellees.

On appeal, the appellee claimed the “law of the case” doctrine did not apply, citing prior cases that did not apply the doctrine when the parties had submitted new evidence on remand.¹⁶⁰ The court of appeals rejected the appellee’s contentions and again reversed the trial court. In the prior cases, observed the court of appeals, the presentation of new evidence was not inconsistent with the court’s remand order and did not alter what the court had already “finally determined.”¹⁶¹ Here, the court’s prior opinion “unequivocally ordered [the appellee] to provide uninsured motorist coverage to the Browns” and its “multifaceted approach—on statutory, public policy, contract, and evidentiary grounds—to the broad issue whether [the appellee] was required to provide uninsured motorist coverage for the Browns left no gap to be filled by the presentation of additional evidence on remand to the trial court.”¹⁶²

H. Appellate Standard of Review For Summary Judgment Awards

It has long been held that the appellate standard of review of summary judgment awards is *de novo*.¹⁶³ A seemingly contradictory notion, however, also often appears in Indiana’s summary judgment jurisprudence, namely that the trial court’s summary judgment decision enters the appellate court “clothed [or cloaked] with a presumption of validity.”¹⁶⁴ The phrase may simply be a

159. *Id.*

160. *Id.* at 1020-21 (discussing *Estate of Martin v. Consolidated R. Corp.*, 667 N.E.2d 219 (Ind. Ct. App. 1996); *Watters v. Dinn*, 666 N.E.2d 433 (Ind. Ct. App. 1996)).

161. *Id.* at 1021.

162. *Id.*

163. See, e.g., *LCEOC, Inc. v. Greer*, 735 N.E.2d 206, 208 (Ind. 2000) (“On appeal from summary judgment, the reviewing court analyzes the issues in the same fashion as the trial court, *de novo*.”); *Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 243 (Ind. 2000) (“The parties’ arguments turn on the construction of the policy language, and there is no factual dispute. Accordingly, this is a proper case for summary judgment and our standard of review is *de novo*.”); *Crum v. City of Terre Haute ex rel. Dep’t of Redev.*, 812 N.E.2d 164, 166 (Ind. Ct. App. 2004) (“In reviewing a grant of summary judgment, where the facts are undisputed and the issue presented is a pure question of law, we review the matter *de novo*.”); *Henrichs v. Pivarnik*, 588 N.E.2d 537, 543 (Ind. Ct. App. 1992) (“We believe that every review of a summary judgment is, in effect, a *de novo* review.”).

164. See, e.g., *Becker v. Kreilein*, 770 N.E.2d 315, 317 (Ind. 2002); *Ind. Dep’t of State Rev. v. Bethlehem Steel Corp.*, 639 N.E.2d 264, 266 (Ind. 1994); *May v. Frauhiger*, 716 N.E.2d 591, 594 (Ind. Ct. App. 1999). This statement appears to have first been made in 1992 in *Indiana Department of State Revenue v. Caylor-Nickel Clinic, P.C.*, 587 N.E.2d 1311, 1312-13 (Ind. 1992), which stated, “[t]his summary judgment, as all trial court judgments, enters the process of appellate review clothed with a presumption of validity.” A search on Premise for opinions containing the phrases “summary judgment” and “clothed with a presumption of validity” within the same paragraph garnered 153 published opinions issued between March 6, 1992, and December 17,

reference to the notion that the appealing party bears the burden of persuasion.¹⁶⁵ Whatever its meaning, however, the court of appeals in *Johnson v. Hoosier Enterprises III, Inc.*¹⁶⁶ expressly stated it does *not* denote a more deferential standard of review than *de novo*.¹⁶⁷

I. Timeliness

1. *Clerk's Failure to Mail Court's Ruling to Plaintiff's Lead Counsel Justified Extending Notice of Appeal Deadline Under Trial Rule 72(E), Even Though Clerk Had Mailed Ruling to Plaintiff's Other Counsel of Record.*—To initiate an interlocutory appeal of right,¹⁶⁸ the appellant must file a Notice of Appeal with the trial court clerk within thirty days of the entry of the interlocutory order.¹⁶⁹ Upon an “application for good cause,” Trial Rule 72 permits a trial court to extend this deadline in instances where: (1) the Chronological Case Summary (“CCS”) does not contain a notation from the clerk evidencing the order was mailed; and (2) “*the party*” requesting the extension was without actual knowledge of the order or relied on incorrect representations by court personnel concerning the order.¹⁷⁰ In *Lake Holiday Conservancy v. Davison*,¹⁷¹ the trial court clerk failed to note the mailing of the trial court’s order denying the appellant’s change of venue motion¹⁷² on the CCS, and the appellant’s lead counsel submitted an affidavit asserting he did not receive notice of the ruling until five weeks after it was made.¹⁷³ However, another attorney from a different law firm, who had entered an appearance on behalf of the appellant at the outset of the case but had not participated in the litigation nor

2004. Such a search would not, of course, pick up any additional unpublished opinions issued by the court of appeals during that same time period that contain the search criteria. The supreme court most recently made this statement during the survey period in *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 779 (Ind. 2004).

165. See, e.g., *Drake ex rel. Drake v. Mitchell Community Schs.*, 649 N.E.2d 1027, 1029 (Ind. 1995) (“Although a summary judgment on appellate review is clothed with a presumption of validity and the appealing party bears the burden of persuasion, we consider the same issues and follow the same process as did the trial court and will uphold such judgment only if the pleadings and materials properly presented, construed in the light most favorable to the non-moving party, show the absence of a genuine issue of material fact.”); *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1371 (Ind. 1992) (“The trial court’s decision on a motion for summary judgment enters the process of appellate review clothed with a presumption of validity. The party appealing from the grant of summary judgment must persuade the appellate tribunal that the judgment was erroneous.”).

166. 815 N.E.2d 542 (Ind. Ct. App. 2004), *trans. denied* (Ind. Feb. 24, 2005).

167. *Id.* at 548.

168. See generally IND. APP. R. 14(A).

169. IND. APP. R. 9(A)(1).

170. IND. TRIAL R. 72(E) (emphasis added).

171. 808 N.E.2d 119 (Ind. Ct. App. 2004).

172. An interlocutory appeal of such a ruling is taken “as a matter of right.” IND. APP. R. 14(A)(8).

173. *Lake Holiday Conservancy*, 808 N.E.2d at 121.

signed any pleadings or motions on the appellant's behalf, was mailed notice of the ruling but did not inform lead counsel of it.¹⁷⁴ Even though the appellant's other lawyer, and thus by extension the appellant, had received notice of the ruling, and even though the Rule 72 speaks in terms of "the party" (and not "lead counsel") not receiving actual notice, the court of appeals affirmed the trial court's grant of a Trial Rule 72 extension of time to file the Notice of Appeal.¹⁷⁵

2. *Order Denying Appellant's Objections to Estate Reopening, Rather Than Initial Order Reopening Estate, Was Order from Which Appellant Could Seek Interlocutory Appeal.*—In *Butler University v. Estate of Verdak*,¹⁷⁶ the probate court granted the appellee's petition to reopen an estate on September 25, 2002.¹⁷⁷ On October 3, 2002, the appellant, who had not been a party to the estate proceeding, filed objections to the appellee's petition.¹⁷⁸ The probate court eventually overruled the appellant's objections by order issued June 18, 2003. Upon the appellant's motion, the trial court certified its June 18, 2003 order for interlocutory appeal.¹⁷⁹

On appeal, the appellee contended the appeal was untimely, claiming that because the issue addressed in the probate court's September 25, 2002 order (namely whether the estate should be reopened) was the same issue addressed in the June 18, 2003 order, the appellant's October 3, 2002 objection was nothing more than a motion to reconsider¹⁸⁰ and therefore the time for seeking interlocutory certification expired thirty days after September 25, 2002.¹⁸¹ The court of appeals rejected the appellee's timeliness argument, noting: (1) "courts certify *orders* for interlocutory appeal, not *issues*"; (2) "[a] trial court has inherent power to reconsider any of its previous rulings so long as the action remains in fieri"; and (3) the appellee had not been a party to the case until it filed its objections on October 2, 2002.¹⁸²

J. Appellate Performance

During the survey period, the court of appeals provided statements of commendation and/or appreciation for quality appellate performances before it.¹⁸³

174. *Id.* at 121 & n.2. The court of appeals' opinion does *not* indicate the appellant's attorney who received the notice had withdrawn his appearance in the case.

175. *Id.*

176. 815 N.E.2d 185 (Ind. Ct. App. 2004).

177. *Id.* at 192.

178. *Id.* at 190, 192.

179. *Id.* at 192.

180. "[M]otions to reconsider do not extend the time for appeal." *State ex rel. Hulse v. Montgomery Circuit Court*, 561 N.E.2d 497, 498 (Ind. 1990).

181. *Estate of Verdak*, 815 N.E.2d at 192 & n.3.

182. *Id.* at 192 (emphasis in original).

183. See, e.g., *Kruse v. Nat'l Bank of Indianapolis*, 815 N.E.2d 137, 140 n.1 (Ind. Ct. App. 2004) ("thank[ing] counsel for their commendable presentations, which assisted [the court] in the determination of this case"); *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1045 n.1 (Ind. Ct. App. 2004), *trans. granted* (Ind. Jan. 27, 2005) ("thank[ing] counsel for their commendable

presentations, which assisted [the court] in the determination of this case”); *Lumbard v. Farmers State Bank*, 812 N.E.2d 196, 198 n.1 (Ind. Ct. App. 2004) (“commend[ing] counsel for their arguments and able presentations”); *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 110 n.2 (Ind. Ct. App. 2004) (“commend[ing] each party for their preparation and presentation”); *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 938 n.1 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004) (“commend[ing] counsel for the quality of their oral and written appellate advocacy”); *Millennium Club, Inc. v. Avila*, 809 N.E.2d 906, 908 n.2 (Ind. Ct. App. 2004) (“thank[ing] . . . appellate counsel for their presentations”); *Forty-One Assocs., LLC v. Bluefield Assocs., L.P.*, 809 N.E.2d 422, 424 n.3 (Ind. Ct. App. 2004) (“thank[ing] counsel for their able presentations, which assisted [the court] in the determination of this case”); *BP Amoco v. Szymanski*, 808 N.E.2d 683, 684 n.1 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004) (“congratulat[ing] and thank[ing] counsel for their excellent presentations”); *Herron v. State*, 808 N.E.2d 172, 175 n.5 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 968 (Ind. 2004) (“commend[ing] counsel for the quality of their oral advocacy”); *Washington v. State*, 807 N.E.2d 793, 796 n.4 (Ind. Ct. App. 2004) (“thank[ing] counsel for their able presentations”); *Carson v. State*, 807 N.E.2d 155, 157-58 n.1 (Ind. Ct. App. 2004) (“thank[ing] counsel for their advocacy”); *Northrop Corp. v. Gen. Motors Corp.*, 807 N.E.2d 70, 76 n.1 (Ind. Ct. App. 2004) (“thank[ing] counsel for their presentations”); *Borth v. Borth*, 806 N.E.2d 866, 869 n.2 (Ind. Ct. App. 2004) (denying appellant’s request for oral argument because “the parties’ excellent briefs adequately address[ed] the issues before [the court]”); *Denton v. State*, 805 N.E.2d 852, 854 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 969 (Ind. 2004) (“commend[ing] appellate counsel for their most able and insightful presentations”); *Montgomery v. State*, 804 N.E.2d 1217, 1219 n.3 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 976 (Ind. 2004) (“thank[ing] counsel for their advocacy”); *Adams v. State*, 804 N.E.2d 1169, 1171 n.3 (Ind. Ct. App. 2004) (“commend[ing] appellate counsel for their most able presentations”); *McClure v. State*, 803 N.E.2d 210, 212 n.1 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 800 (Ind. 2004) (“commend[ing] counsel on their presentations and preparation”); *McCarty v. State*, 802 N.E.2d 959, 961 n.2 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 803 (Ind. 2004) (“commend[ing] counsel for the quality of their appellate advocacy”); *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 712 n.2 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 805 (Ind. 2004) (“commend[ing] counsel for the quality of their written and oral appellate advocacy”); *Alexander v. Cottey*, 801 N.E.2d 651, 653 n.1 (Ind. Ct. App. 2004) (“commend[ing] counsel for their able presentations”); *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 987 n.4 (Ind. Ct. App. 2003) (“commend[ing] counsel on the quality of their presentations, especially in light of the complicated procedural and factual nature of the case”); *Borsuk v. Town of St. John*, 800 N.E.2d 217, 218 n.1 (Ind. Ct. App. 2003) (“thank[ing] counsel for their preparation and able advocacy”); *Andrianova v. Ind. Family & Soc. Servs. Admin.*, 799 N.E.2d 5, 7 n.2 (Ind. Ct. App. 2003) (“commend[ing] both counsel for the quality of their participation at [oral argument]”); *Brabandt v. State*, 797 N.E.2d 855, 858 n.1 (Ind. Ct. App. 2003) (“commend[ing] counsel on the quality of their written and oral advocacy”); *McHenry v. State*, 797 N.E.2d 852, 853 n.3 (Ind. Ct. App. 2003), *vacated by* 820 N.E.2d 124 (Ind. 2005) (“commend[ing] counsel on their able presentations”); *Gunkel v. Renovations, Inc.*, 797 N.E.2d 841, 842 n.1 (Ind. Ct. App. 2003), *vacated by* 822 N.E.2d 150 (Ind. 2005) (“thank[ing] counsel for their capable presentation in a situation where these ‘Rolling Stones’ could have made a complicated matter even more complicated”); *Citizens Action Coalition of Ind., Inc. v. NIPSCO*, 796 N.E.2d 1264, 1266 n.1 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 799 (Ind. 2004) (expressing “gratitude for the excellent briefs and oral argument in what [was] for [it] a rather complicated case”); *S.H. v. D.H.*, 796 N.E.2d 1243, 1247 n.1 (Ind. Ct. App. 2003) (“commend[ing]

However, this survey period, as in previous years,¹⁸⁴ had its cadre of appeal-related problems that the appellate tribunals determined serious enough to warrant published comment. Many of those instances are discussed below, not to draw attention to those who made the mistakes but rather to the mistakes themselves, so future practitioners can learn from and avoid them.

1. *Contents of Briefs and Petitions.*—The survey period saw repeated problems with appellate briefs, particularly concerning improper Statements of Facts and/or Statements of the Case (argumentativeness, failure to state the facts in the manner commensurate with the applicable standard of review, lack of record citations, etc.),¹⁸⁵ arguing facts not supported by the record evidence,¹⁸⁶ failing to attach the appealed order to the appellant's brief,¹⁸⁷ burying substantive

counsel on their professional manner and workmanship, especially given the time constraints"). We have attempted to gather all the cases in which the court of appeals provided such statements. If we missed some, the author apologizes to those whose cases are not mentioned. The author also acknowledges there are many outstanding appellate performances that for one reason or another are not expressly acknowledged in published opinions.

184. See Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 948-50 (2003) [hereinafter Cressler 2003]; Douglas E. Cressler, *A Year of Transition In Appellate Practice*, 35 IND. L. REV. 1133, 1151 (2002) [hereinafter Cressler 2002]; Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 774-78 (2001).

185. See, e.g., *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 173 (Ind. Ct. App. 2004) (granting motion to strike various statements in Appellant's Brief that were "unsupported by citations to the transcript/appendix and/or are irrelevant factual assertions"); *Montgomery v. Trisler*, 814 N.E.2d 682, 686 (Ind. Ct. App. 2004) (noting: (1) appellant's failure to file an "amended table of contents, amended statutes and trial rules and correction page" following court's grant of appellant's motion seeking such leave; (2) inappropriate argument in the Statement of the Case and Statement of Facts; (3) and failure to provide record citations for some factual assertions); *Beall v. Mooring Tax Asset Group*, 813 N.E.2d 778, 779 n.1 (Ind. Ct. App. 2004); *Dunn v. Meridian Mut. Ins. Co.*, 810 N.E.2d 739, 739 n.1 (Ind. Ct. App. 2004), *trans. pending*; *Reeder Assocs. II v. Chicago Belle, Ltd.*, 807 N.E.2d 752, 757 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 972 (Ind. 2004); *Kelley v. Vigo County Sch. Corp.*, 806 N.E.2d 824, 832 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 983 (Ind. 2004) (noting the appellant's improper Statement of Facts "required the expenditure of additional time by both the [appellee], to provide missing information, and this court, upon which it was incumbent to verify certain matters"); *Schaefer v. Kumar*, 804 N.E.2d 184, 196 n.13 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004) ("The Statements of the Facts and of the Case both counsel provided were . . . transparent attempts to discredit either the judgment or the opponent's argument and were clearly not intended to be a vehicle for informing this court."); *Rea v. Shroyer*, 797 N.E.2d 1178, 1179 n.1 (Ind. Ct. App. 2003).

186. See *Med. Assurance of Ind. v. McCarty*, 808 N.E.2d 737, 746 n.1 (Ind. Ct. App. 2004); *Schaefer*, 804 N.E.2d at 187 n.3; *Saler v. Irick*, 800 N.E.2d 960, 970-71 n.7 (Ind. Ct. App. 2003); *Carr v. State*, 799 N.E.2d 1096, 1097 (Ind. Ct. App. 2003); *Naumoski v. Bernacat*, 799 N.E.2d 58, 63 n.1 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 800 (Ind. 2004).

187. *Wilkerson v. Harvey*, 814 N.E.2d 686, 689 n.1 (Ind. Ct. App. 2004), *trans. denied* (Ind. Mar. 3, 2005); *Airgas Mid-Am., Inc. v. Long*, 812 N.E.2d 842, 843 n.2 (Ind. Ct. App. 2004); *Orban v. Krull*, 805 N.E.2d 450, 456 n.1 (Ind. Ct. App. 2004).

arguments in footnotes,¹⁸⁸ failing to state the applicable standard of review,¹⁸⁹ and mischaracterization of an opposing party's argument.¹⁹⁰

2. *Appendices.*—There were also an inordinately large number of problems with appellate appendices,¹⁹¹ including failing to file appendices,¹⁹² filing too much material in appendices,¹⁹³ filing the entire trial transcript either in¹⁹⁴ or in lieu of¹⁹⁵ the appendix, filing appendices without tables of contents,¹⁹⁶ failing to number appendix pages,¹⁹⁷ and failing to include documents in the appendices critical to the trial courts' rulings.¹⁹⁸

The latter appendix problem resulted in harsh penalties for some litigants. In *Kelley v. Vigo County School Corp.*, the court found the Appellant's Appendix omission so problematic that it awarded appellate attorneys fees to the opposing party.¹⁹⁹ In *Hughes v. King*, the Appellant's Appendix included only the trial court's order (and not the designated evidence upon which the trial court's summary judgment decision had been based); therefore, the court of appeals dismissed the appeal.²⁰⁰ In *Yoquelet v. Marshall County*,²⁰¹ another appeal from an award of summary judgment, the court of appeals ruled that by failing to provide the summary judgment materials designated to the trial court by the parties, the appellant had "failed to prove . . . the trial court erred" and therefore

188. *Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 41-42 n.1 (Ind. Ct. App. 2004), *trans. pending*.

189. *Beall*, 813 N.E.2d at 779 n.1; *Roberts v. ALCOA, Inc.*, 811 N.E.2d 466, 473 n.1 (Ind. Ct. App. 2004); *Supervised Estate of Williamson v. Williamson*, 798 N.E.2d 238, 241 n.1 (Ind. Ct. App. 2003).

190. *Huffman v. Office of Environ. Adjudication*, 811 N.E.2d 806, 813 n.6 (Ind. 2004).

191. *See generally* IND. APP. R. 49-50.

192. *Glass v. State*, 801 N.E.2d 204, 206 n.3 (Ind. Ct. App. 2004).

193. *Evans v. Buffington Harbor River Boats, LLC*, 799 N.E.2d 1103, 1107 n.2 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 804 (Ind. 2004).

194. *Burge v. Teter*, 808 N.E.2d 124, 127 n.3 (Ind. Ct. App. 2004).

195. *Robinson v. State*, 799 N.E.2d 1202, 1203 n.1 (Ind. Ct. App. 2003).

196. *Id.*; *In re Estate of Goldman*, 813 N.E.2d 784, 786 n.1 (Ind. Ct. App. 2004) ("admonish[ing appellant's counsel] to provide a table of contents in any future appendix filed with [the court of appeals]," stating "[h]er failure to do so impeded [the judges'] review, as [they] had to thumb through the appendix to determine which documents she had provided and where [they] could find them"); *Messer v. Cerestar USA, Inc.* 803 N.E.2d 1240, 1243 n.2 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004) (noting "[t]he failure to include the table of contents, such as occurred in this case, hinders our ability to review the appeal"); *Star Wealth Mgmt. Co. v. Brown*, 801 N.E.2d 768, 772 n.5 (Ind. Ct. App. 2004).

197. *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 173 (Ind. Ct. App. 2004); *Reeder Assocs. II v. Chicago Belle, Ltd.*, 807 N.E.2d 752, 757 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 972 (Ind. 2004).

198. *See, e.g.*, *Trail v. Boys & Girls Club of Northwest Ind.*, 811 N.E.2d 830, 834 n.5 (Ind. Ct. App. 2004), *trans. pending*; *Star Wealth Mgmt Co.*, 801 N.E.2d at 772.

199. 806 N.E.2d 824, 832-33 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 983 (Ind. 2004).

200. 808 N.E.2d 146, 147-48 (Ind. Ct. App. 2004).

201. 811 N.E.2d 826, 827-28 (Ind. Ct. App. 2004).

affirmed partial summary judgment against the appellants.²⁰² In reaching this result, the *Yoquelet* majority distinguished *Johnson v. State*,²⁰³ a criminal appeal in which the supreme court held that

[t]he better practice for an appellate tribunal to follow in criminal appeals where an Appendix is not filed or where an Appendix is missing documents required by rule is to order compliance with the rules within a reasonable period of time, such as thirty days. If an appellant inexcusably fails to comply with an appellate court order, then more stringent measures, including dismissal of the appeal, would be available as the needs of justice might dictate.²⁰⁴

Judge Mathias dissented, believing the procedure set out in *Johnson* should not be limited to criminal appeals because “[a]ll cases . . . are too important to resolve other than on their merits, except in unusual circumstances which are not present here.”²⁰⁵

3. *Candor to the Tribunal*.—As in years past,²⁰⁶ the highly improper practice of making claims about the record that the record does not support was brought up again by the court of appeals during the survey period.²⁰⁷ The recurrence of this particular problem is baffling. There is no better way, at least in the author’s opinion, for a party to have its argument and assertions viewed with a jaundiced eye than to be caught citing the record or an authority for a proposition that the record or authority does not support. At best such behavior represents lazy, sloppy lawyering; at worst it demonstrates a lack of integrity and honesty that discredits the bar generally and the individual practitioner specifically. Either way, the client’s interests can be substantially hindered by the cloud of untrustworthiness and suspicion cast over the remainder of the advocate’s representations, which is exactly the opposite of what the appellate practitioner ultimately is trying to achieve.

4. *Performance That Warranted Appellate Attorney Fees and/or Strong Public Censure by the Appellate Tribunal*.—There were some appellate performances that drew particularly strong denunciation from the court and/or an

202. *Id.* See also *Thomas v. N. Cent. Roofing*, 795 N.E.2d 1068, 1069 (Ind. Ct. App. 2003) (denying appellee’s “motion to supplement the record” to include evidence that had not been submitted to the trial court, which effectively resulted in the trial court being reversed for lack of evidence supporting its judgment).

203. 756 N.E.2d 965 (Ind. 2001).

204. *Yoquelet*, 811 N.E.2d at 829 (quoting *Johnson*, 756 N.E.2d at 967).

205. *Id.* at 830 (Mathias, J., dissenting).

206. See Cressler 2003, *supra* note 184, at 949 & n.106; Cressler & Cardoza, *supra* note 184, at 776 & n.374.

207. See *Shepherd v. Carlin*, 813 N.E.2d 1200, 1202 n.1 (Ind. Ct. App. 2004) (“admonish[ing] [the appellee’s] counsel for taking opposing counsel’s remark out of context and for mischaracterizing her interpretation of the statute” and “remind[ing] [the appellant’s] counsel of their duty of candor toward the tribunal under Indiana Professional Conduct Rule 3.3”); *Star Wealth Mgmt. Co. v. Brown* 801 N.E.2d 768, 772 n.7 (Ind. Ct. App. 2004) (“We caution counsel to honor the line between persuasive advocacy and distortion of the record.”).

award of appellate attorney fees. Some of these cases involved pro se litigants who frustrated the courts either by their incoherent arguments and/or numerous failures to abide by the appellate rules,²⁰⁸ or by their vexatious abuse of the judicial process.²⁰⁹ Many, however, involved licensed attorneys.

In *Schaefer v. Kumar*,²¹⁰ the court of appeals criticized “both counsels’ numerous violations of our rules and numerous arguments and motions by both parties, which arguments and motions delayed the proceedings, often obscured the issues and otherwise impaired our ability to review the proceedings below, and in some cases could be characterized as wholly trivial in nature.”²¹¹ *Schaefer* serves as reminder that, because appellate courts are busy enough deciding cases on the procedural and/or substantive merits, appellate counsel will rarely advance their clients’ interests by forcing appellate judges to referee petty collateral squabbles.

In *Lasater v. Lasater*,²¹² the court of appeals used two-and-a-half pages of the Northeast (Second) Reporter to reproach the appellant’s counsel for “the inflammatory nature of [her] Appellant’s Brief,” which was replete with statements impugning the integrity of opposing counsel and the trial court.²¹³ The opinion concludes its reprimand with the following, which all appellate practitioners would do well to remember:

[S]uch comments do little to advance [the appellant’s] position as to why the trial court committed reversible error and, therefore, do not promote responsible advocacy on her behalf. Significant parts of her brief are permeated with sarcasm and disrespect. *WorldCom Network Services, Inc. v. Thompson*, 698 N.E.2d 1233, 1236-37 (Ind. Ct. App. 1998) (“Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”), *trans. denied*. *Such a brief reflects a lack of professional responsibility on the part of counsel and does little to serve the interest of the client to whom counsel is responsible in this appeal*. See *Moore v. Liggins*, 685 N.E.2d 57, 66-67 (Ind. Ct. App. 1997).²¹⁴

Although the court noted its “plenary power to order a brief stricken from [its] files and to affirm the trial court without further ado” “[f]or the use of

208. See *Thacker v. Wentzel*, 797 N.E.2d 342, 345-48 (Ind. Ct. App. 2003) (finding appellant’s “non-compliance with our appellate rules of procedure is substantial, permeates his entire brief, and precludes our review of his allegation of error on appeal”).

209. *Sumbry v. Misc. Docket Sheet for Year 2003*, 811 N.E.2d 457, 458-61 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 980 (Ind. 2004); *Sims v. Scopelitis*, 797 N.E.2d 348, 352 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 800 (Ind. 2004).

210. 804 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

211. *Id.* at 196 n.13.

212. 809 N.E.2d 380 (Ind. Ct. App. 2004).

213. *Id.* at 402-04.

214. *Id.* at 403-04 (emphasis added).

impertinent, intemperate, scandalous, or vituperative language in briefs on appeal impugning or disparaging this court, the trial court, or opposing counsel,”²¹⁵ it chose not to do so “in the interest of evaluating the merits of [the appellant’s] issues on appeal.”²¹⁶ It quickly added, however:

Because we choose not to exercise our discretion to strike the brief, however, counsel should not confuse this with approval or condoning of *the unprofessional, disrespectful, and at times outrageous remarks and allegations made in the body of the brief. We appreciate vigorous advocacy, but we will not countenance the sort of lawyering exhibited here. We admonish counsel to advocate more professionally in future matters before this court.*²¹⁷

Despite the problematic behavior noted in *Lasater*,²¹⁸ this year’s “What Was Counsel Thinking?! Award” unquestionably goes to the appellant’s counsel in *Butrum v. Roman*,²¹⁹ a case involving a mother’s petition to modify child support and for contributions to the parties’ eighteen-year-old daughter’s (“Daughter’s”) college expenses. The court of appeals had previously affirmed the trial court’s ruling against Father.²²⁰ Thereafter, Father’s attorney filed a petition for rehearing in the attorney’s own name written as a first-person narrative from the perspective of Daughter. The brief began, “Hello, my name is [Daughter],” and continued with that type of narrative, including what purported to be Daughter’s recitation of the facts and argument on how the court of appeals had reached the wrong conclusion.²²¹ The court of appeals understandably found the rehearing petition quite problematic, so much so that it published an opinion denying Father’s petition for rehearing. The court wrote:

We find the petition for rehearing to be inappropriate for two reasons. First, the brief neither cites authority nor makes legal argument. Second, Kesler represents [Father]. [Daughter] is not a party in this case. In fact, in the trial court, [Father]’s interests were adverse to those of [Daughter]. There is no indication that [Daughter] has now authorized [Father’s counsel] to speak for her. Thus, it appears that [Father’s counsel] is trying to do one of two things, both of which are unacceptable. Either he is trying to introduce additional evidence on rehearing by way of [Daughter]—which he is prohibited from doing at this stage—or he is using [Daughter] as a mouthpiece to voice his criticisms about our opinion. Although lawyers “are completely free to

215. *Id.* at 404 (citing *Wright v. State*, 772 N.E.2d 449, 463 (Ind. Ct. App. 2002)).

216. *Id.*

217. *Id.* (emphasis added).

218. Amazingly, such lack of civility and professionalism seems to be another recurrent problem the court of appeals notes again and again. *See, e.g.*, Cressler 2003, *supra* note 184, at 949-50 & nn.102-03; Cressler & Cardoza, *supra* note 184, at 774-75 & nn.362-72.

219. 806 N.E.2d 66 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 968 (Ind. 2004).

220. *Id.* (citing *Butrum v. Roman*, 803 N.E.2d 1139 (Ind. Ct. App. 2004)).

221. *Id.* at 67.

criticize the decisions of judges,” *In re Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003), *cert. denied*, 540 U.S. 813, 124 S. Ct. 63, 157 L.Ed.2d 27 (2003), we find it inappropriate to hide behind a client’s child to do so. Accordingly, we strike the petition for rehearing under Appellate Rule 42 as inappropriate.²²²

5. *More Practice Pointers.*—The previous examples of problematic appellate performances serve as practice pointers. Here are a few more.

a. *Use pinpoint citations.*—In *Haddock v. State*,²²³ the court of appeals discussed its desire for practitioners to use pinpoint citations because they “help [the court] determine where, within a decision, support for [the advocate’s] contentions may be found, or whether support can be found in that decision at all.”²²⁴ The court “direct[ed] Haddock’s counsel to Ind. Appellate Rule 22, which provides that citations to decisions in briefs are to follow the format put forth in the current edition of a Uniform System of Citation (Bluebook),” and further explained:

When referring to specific material within a source, a citation should include both the page on which the source begins and the page on which the specific material appears. Uniform System of Citation Rule 3.3 (17th ed. 2000). As we have often noted, we will not, on review, sift through the record to find a basis for a party’s argument. Nor will we search through the authorities cited by a party in order to try to find legal support for its position.²²⁵

Practitioners should also realize that failure to use pinpoint citations may cause a reviewing judge to question whether the attorney may intentionally be “hiding the ball” because the opinion may not support what the attorney claims it supports. Again, the overall intent in legal writing should be to engender confidence, rather than uncertainty, in both the advocate and the position advocated.

b. *Accurately argue precedent.*—Of course, if you are going to provide pinpoint citations, then you better make sure you accurately discuss the precedent cited. In *L.W. v. State*,²²⁶ the court of appeals, after observing that the Appellee’s Brief inaccurately discussed an important distinction in key precedent, expressly “remind[ed] counsel that careful perusal of precedent is an integral part of superior appellate practice.”²²⁷

c. *Petitions to transfer.*—In a rare published order denying transfer, the supreme court provided guidance concerning the proper content of the “Argument” section of the transfer petition.²²⁸ The entirety of the transfer

222. *Id.*

223. 800 N.E.2d 242 (Ind. Ct. App. 2003).

224. *Id.* at 245 n.5.

225. *Id.* (citing *Wright v. Elston*, 701 N.E.2d 1227, 1231 (Ind. Ct. App. 1998)).

226. 798 N.E.2d 904 (Ind. Ct. App. 2003).

227. *Id.* at 907 n.3.

228. *See Lockridge v. State*, 809 N.E.2d 843 (Ind. 2004).

petition at issue's argument consisted of the following: "Ms. Lockridge relies on the issues as presented in his [*sic*] original brief in support of her Appeal."²²⁹ The court wrote:

In a Petition to Transfer, mere reference to argument and/or authorities presented in brief to [the court of appeals], without an explanation of the reasons why transfer should be granted, does not satisfy Rule 57(G).

At the same time, Appellate Rule 57(G)(4) should not be read to require a party to repeat all of the arguments made in the brief to the Court of Appeals. A Petition to Transfer constitutes a request to our court to review a decision of the Court of Appeals in its entirety; the request is that the entire appeal be transferred to our court and be before us as though it had not been reviewed by the Court of Appeals. . . . Given this system, the "argument" contained in a brief in support of a petition to transfer should primarily be an argument as to why the Supreme Court should grant transfer and, in a brief in opposition, as to why the Court should not. (Principal considerations governing the Supreme Court's decision whether to grant transfer are set forth in App. R. 57(H).) It is appropriate in a transfer brief to cross-reference the analysis of the merits of the underlying legal argument contained in the brief to the Court of Appeals. The Court observes, however, that the most helpful transfer briefs combine argument as to why the court should (or should not) grant transfer and argument on the merits.²³⁰

d. Appeals from motions to correct errors.—"[T]he filing of a motion to correct error is a procedural matter about which [the court of appeals] should be informed," the court of appeals noted in *Supervised Estate of Williamson v. Williamson*.²³¹ In *Williamson*, the appellant failed "to acknowledge anywhere in its brief that it filed a motion to correct error that was denied."²³² Instead, the court "happened upon the order denying the motion in the appellant's appendix."²³³ This was an important mistake, because, the court of appeals noted, "[t]he appellate standard of review differs based on whether [the court is] reviewing the denial of a motion to correct error or a judgment on the merits."²³⁴

e. Citation to foreign authority.—In *Steiner v. Bank One Indiana, N.A.*,²³⁵ "[t]he trial court and Steiner cite[d] to several cases from other jurisdictions."²³⁶ Applying Indiana Court of Appeals precedent from 1966, the court of appeals stated, "[w]e need not look to other jurisdictions . . . because there is Indiana case

229. *Id.* at 844 (typographical error in transfer petition).

230. *Id.*

231. 798 N.E.2d 238, 241 n.1 (Ind. Ct. App. 2003).

232. *Id.*

233. *Id.*

234. *Id.*

235. 805 N.E.2d 421 (Ind. Ct. App. 2004).

236. *Id.* at 425 n.2.

law directly on point.”²³⁷ The fact that the court of appeals took the time to make this comment in its opinion serves as a reminder to appellate practitioners (and trial court judges) of the importance of looking to Indiana precedent first and foremost before seeking guidance from other jurisdictions.

f. “Those who live in glass houses”—In *Imre v. Lake States Insurance Co.*,²³⁸ the appellee argued the appellant had “forfeited appellate review” because the Appellant’s Brief contained “several material violations of the Indiana Rules of Appellate Procedure that render the brief difficult to comprehend and wastes this court’s time.”²³⁹ Any waste of the court’s time, however, appeared to stem from the “ten pages of [the] Appellee’s Brief . . . devoted to criticisms of [the] Appellant’s Brief”²⁴⁰ rather than from the appellant’s missteps. The court declined the appellee’s invitation to find the appeal forfeited and pointed out, without coming right out and saying, that “those who live in glass houses should not throw stones”:

Indeed, we note that, after asserting [the appellant] failed to comply with Indiana Appellate Rule 46(A)(4) by failing to include a separate statement of the issue for her ‘setoff argument,’ [the appellee] failed to include a separate statement of the issue for its setoff argument. . . . In addition, [the appellee’s] attorney inaccurately characterized himself as ‘Attorney for Appellant’ on the cover page of Lake States’ Appellee’s Brief.²⁴¹

Good practice tips to take away from *Imre* are: (1) avoid picayunish nitpicking of the other side’s brief (which makes you look like a kindergartner tattling on a classmate and exasperates the judges whose time is wasted having to read and address such petty contentions) and only make such criticisms if the problems in opposing counsel’s brief significantly prejudiced you – if they did not, then they probably are not worth mentioning; (2) if you do make such criticisms, keep them short and concise—if (as in *Imre*) they comprise one-third of your brief, then it may appear you lack meritorious substantive points worth making with the space you fill up with non-substantive collateral attacks; and finally (3) take a close look at your own brief before launching an extended criticism of opposing counsel’s brief to avoid “the pot calling the kettle black.”

K. Unusual Cases

1. *Appellate Rule 31*.—Ask any practitioner, even one who routinely

237. *Id.* (citing *Smith v. Beneficial Fin. Co.*, 218 N.E.2d 921, 922 (1966)).

238. 803 N.E.2d 1126 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 806 (Ind. 2004).

239. *Id.* at 1129.

240. According to the opinion, the alleged deficiencies concerned: “(1) grammatical, quotation, and formatting errors, (2) the lack of more precise subheadings, (3) material misrepresentations, (4) failure to provide adequate citation, (5) failure to argue cogently, (6) failure to include a more precise statement of the issues, (7) failure to include the word “we” in a quote, and (8) minor technical errors.” *Id.* (footnote omitted).

241. *Id.* at 1129 n.1.

practices in our appellate courts, what Appellate Rule 31 says, and most probably could not give you a definitive answer without opening their rule books. The rule addresses the procedure used when “no Transcript of all or part of the evidence is available,” permitting a party to “prepare a verified statement of the evidence from the best available sources” and then filing a moving to certify the statement with the trial court or Administrative Agency.²⁴² Given the ease with which trial courts can generate a transcript from an audio recording, Rule 31 is rarely used. It came up, however, in *Roberts v. State*,²⁴³ a case in which “[t]he recording equipment typically used to record trials failed to function at Roberts’ trial.”²⁴⁴ Applying Appellate Rule 31, “the trial court certified as the Statement of the Evidence for Appeal affidavits from the court reporter, the public defender, the prosecutor and the judge.”²⁴⁵

2. *Failure of Trial Court to Rule on Acceptance of Belatedly Designated Evidence Prevents Consideration of Evidence on Appeal.*—In *Bourbon Mini Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*,²⁴⁶ the appellant on appeal attempted to rely on an affidavit it had not designated to the trial court when responding to the appellee’s motion for summary judgment but instead had submitted belatedly.²⁴⁷ During the summary judgment hearing, the appellant asked the trial court to deem the affidavit timely submitted, but the trial court never ruled on the issue, thus preventing the court of appeals from knowing whether the trial court had ever considered the affidavit “properly designated.”²⁴⁸ Accordingly, because the court of appeals “may only consider that evidence which has been specifically designated to the trial court” when reviewing a motion for summary judgment, the court refused to consider the affidavit on appeal.²⁴⁹

3. *Court Permits Appeal to Be Revived Following Voluntary Dismissal “Without Prejudice” Even Though, in Hindsight, It Should Not Have Permitted the Dismissal.*—Appellate Rule 37 provides that the court of appeals can dismiss an appeal without prejudice upon a verified motion from a party that demonstrates “remand will promote judicial economy or is otherwise necessary

242. IND. APP. R. 31(A).

243. 799 N.E.2d 549 (Ind. Ct. App. 2003).

244. *Id.* at 550.

245. *Id.* The court of appeals rejected Roberts’s constitutional challenge to the lack of a transcript, finding the “evidence . . . relatively straightforward and not significantly in dispute,” thereby permitting “the parties to argue the issues upon appellate review and for [the court of appeals] to make informed decisions.” *Id.* at 551. In so holding, the court expressly distinguished *Emmons v. State*, 492 N.E.2d 303, 305 (Ind. 1986), in which the supreme court determined the lack of a voir dire transcript, the reconstruction of which would have provided “a ‘Herculean task due to the numerous questions generally posed to a prospective jury panel,’” required the defendant receive a new trial. *Roberts*, 799 N.E.2d at 550.

246. 806 N.E.2d 14 (Ind. Ct. App. 2004).

247. *Id.* at 23 n.5.

248. *Id.*

249. *Id.*

for the administration of justice.”²⁵⁰ In *Evans v. Buffington Harbor River Boats, LLC*,²⁵¹ the court of appeals opined that its motion panel’s decision to dismiss a previous appeal in the case without prejudice under Rule 37 had not promoted judicial economy or served the administration of justice.²⁵² The question now before the court was what to do about it. It concluded that, despite Rule 37’s parameters not being met, it could not find the appellants had waived their ability to pursue a subsequent appeal because its previous order had dismissed the prior appeal “without prejudice.”²⁵³

III. MISCELLANEOUS DEVELOPMENTS

A. Data From the Indiana Supreme Court

The Indiana Supreme Court conducted seventy-six oral arguments during its fiscal year ending June 20, 2004 (up from fifty-eight in fiscal year 2003), while disposing of 1050 cases that required a vote from each justice.²⁵⁴ Of these 1050 dispositions, fifty-five percent were criminal cases (a six percent increase from fiscal year 2003) and thirty percent were civil, tax, or other cases not involving attorney discipline, judicial discipline, or original actions (a one percent decrease from fiscal year 2003).²⁵⁵ However, 154 of the 1050 dispositions were resolved by majority opinion or published dispositive order,²⁵⁶ thirty-four percent of which were criminal cases²⁵⁷ (a one percent decrease from fiscal year 2003), and thirty-five percent of which were civil, tax, or other cases not involving attorney discipline, judicial discipline, or original actions (a nine percent increase over fiscal year 2003).²⁵⁸ These numbers demonstrate the court’s continued commitment to developing the civil law in Indiana, as they show that although the percentage of total criminal dispositions increased and civil dispositions slightly decreased, the percentage of published civil opinions appreciably increased while the percentage of published criminal cases slightly decreased.

B. Data From the Indiana Court of Appeals

During calendar year 2004, the Indiana Court of Appeals continued its frenetic pace to keep up with the overwhelming number of cases filed with it. It

250. IND. APP. R. 37.

251. 799 N.E.2d 1103 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 804 (Ind. 2004).

252. *See id.* at 1114-15.

253. *Id.* at 1115.

254. *See* INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2003-JUNE 30, 2004, at 31 (2004) [hereinafter 2004 ANNUAL REPORT], and other figures available at the Division of Supreme Court Administration, 313 Statehouse, 200 W. Washington St., Indianapolis, Indiana.

255. *Compare id. with* INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2002-JUNE 30, 2003, at 31 (2003) [hereinafter 2003 ANNUAL REPORT].

256. *See* 2004 ANNUAL REPORT, *supra* note 254, at 31.

257. *Id.*

258. *Compare id. with* 2003 ANNUAL REPORT, *supra* note 255, at 31.

disposed of 2302 cases,²⁵⁹ an increase of sixty dispositions over 2003,²⁶⁰ and heard sixty-seven oral arguments.²⁶¹ Once fully briefed, the average age of a case in chambers of a judge was 1.8 months, a slight increase over 2003.²⁶² The court reversed the judgment of the trial court in about thirty-five percent of the civil appeals and in about fifteen percent of the criminal (non post-conviction relief) appeals,²⁶³ and about twenty-seven percent of its opinions were published.²⁶⁴ During this time period, the Chief Judge handed down 7293 orders,²⁶⁵ 2599 of which pertained to various extensions of time (only twenty-seven of which were denied), and 295 of which pertained to permissive interlocutory appeals (185 of which were denied).²⁶⁶

C. *The McHenry Experiment*

Although outside the survey period, the Indiana Supreme Court's opinion in *McHenry v. State*,²⁶⁷ deserves mention. In that opinion, Justice Brent Dickson "experiment[ed]" with a new style of opinion writing, namely the placement of "all citations unessential to the text . . . in footnotes, and substantive matter that otherwise might appear in footnotes . . . in the text."²⁶⁸ Recognizing that such a "format does not meet with universal approval,"²⁶⁹ the *McHenry* opinion expressly invites "[t]he public, the bench, and the bar . . . to comment to the Supreme Court Administrator, 315 State House, Indianapolis, IN, 46204."²⁷⁰ The author has received several thoughtful and well-reasoned written responses and desires more of the same. The author hopes to discuss the results of the "*McHenry* experiment" in next year's Appellate Procedure survey article, so please send in your thoughts.

D. *A Farewell to Cressler*

Finally, the author would be remiss if he failed to mention a bitter-sweet development in Indiana appellate practice. Doug Cressler, the well-respected Administrator of the Indiana Supreme Court, resigned his position in June 2004 to pursue an opportunity as Chief Deputy Clerk of the United States Court of Appeals for the Tenth Circuit located in Denver, Colorado. While "bitter" for Hoosiers, this change was "sweet" for Cressler, who loves the Rocky Mountains and spent regular time in them during well-earned vacations throughout his nine-

259. See INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT 1 (2005).

260. Compare *id.* with INDIANA COURT OF APPEALS, 2003 ANNUAL REPORT 1 (2004).

261. See INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT, *supra* note 259, at 1.

262. See *id.*

263. See *id.*

264. See *id.* at 4.

265. See *id.* at 12.

266. See *id.*

267. 820 N.E.2d 124 (Ind. 2005).

268. *Id.* at 126 n.2.

269. *Id.* (citing Richard A. Posner, *Against Footnotes*, 38 CONST. REV. 24 (Summer 2001)).

270. *Id.*

year tenure as Indiana's Supreme Court Administrator.

During his tenure as Administrator, Doug served as an adjunct professor at the Indiana University School of Law—Indianapolis, teaching courses in both Appellate Procedure and Professional Responsibility, and has been a prolific author.²⁷¹ He also was extensively involved in the Indiana State Bar Association, serving as Secretary of its Appellate Practice Section and chairing a subcommittee on the groundbreaking Indiana Ethics 2000 Task Force. Besides these noted accomplishments, Mr. Cressler likely will be remembered most by Indiana's appellate practitioners as the fount of knowledge about Indiana Supreme Court practice and procedure, with a kind word for all, the patience of Job, and an inexhaustible willingness to provide prompt and thorough answers to practitioner's questions. The Division of Supreme Court Administration wishes Doug all the best in his new endeavor and hopes the Tenth Circuit's practicing bar realizes what an asset it gained in June 2004.

271. See, e.g., Cressler 2004, *supra* note 1; Cressler 2003, *supra* note 184; Cressler 2002, *supra* note 184; Cressler & Cardoza, *supra* note 184; Douglas E. Cressler, *An Old Tort with a Unique Hoosier History Finds New Life—Seduction*, RES GESTAE, June 2004, at 26; Douglas E. Cressler, *Appellate Practice from Inside The Indiana Supreme Court Administrator's Office*, THE APPELLATE ADVOCATE, Spring 1998, at 5; Douglas E. Cressler, *Mandated Rebriefing: A Judicial Mechanism For Enforcing Quality Control in Criminal Appeals*, RES GESTAE, July 2000, at 20; Douglas E. Cressler, *Requiring Proof Beyond A Reasonable Doubt In Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785 (1994); Douglas E. Cressler, *Spoilation of Evidence*, 36 RES GESTAE 510 (1993); Douglas E. Cressler, Note, *Medicare Provider Reimbursement Disputes: Mapping the Contorted Borders of Administrative and Judicial Review*, 21 IND. L. REV. 705 (1988), reprinted at 26 SOC. SEC. REP. SERV. 741 (1989).

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

MICHAEL A. DORELLI*

During the survey period,¹ the Indiana Supreme Court handed down a number of significant decisions with implications for practitioners in state court, matters pending in small claims court, and litigants pursuing the alternative dispute resolution forum of arbitration. The court of appeals also addressed a broad range of procedural issues dealing with everything from service of process to the verdict of the jury, and beyond.

As it becomes increasingly difficult to anticipate every nuance or implication of often case-dispositive procedural rules, the courts continued during the survey period to provide invaluable direction to the Indiana practitioner toward a more refined understanding of the tenets of civil procedure and, more importantly, the manner in which those tenets are applied in practice.

I. INDIANA SUPREME COURT DECISIONS

A. *Conflict of Laws*—*Dépeçage* and *Lex Loci Delecti*

In a pair of decisions in less than three months, the Indiana Supreme Court ruled that Indiana does not permit *dépeçage*—the process of analyzing different issues within the same case separately under the laws of different states—nor has it adopted the Restatement (Second) of Conflict of Laws' policy analysis in connection with the doctrine of *lex loci delecti*—which dictates application of the law of the state where the last event necessary to make an actor liable for the alleged wrong takes place.

In *Simon v. United States*,² the estates of individuals killed in the crash of a small private aircraft traveling from Pennsylvania to Kentucky brought a wrongful death action under the Federal Tort Claims Act ("FTCA"),³ against the United States, for allegedly publishing an inaccurate landing approach chart, and against air traffic controllers in Indianapolis, for clearing the pilot for an approach that was out of service, as well as alleging other negligent acts or omissions.⁴ Under the FTCA, a court applies "the whole law, including choice-of-law rules, of the place where the acts of negligence occurred."⁵ In *Simon*, acts of negligence occurred in both Indiana and Washington, D.C. ("D.C."), thus

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2003 through September 30, 2004—as well as several significant amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 805 N.E.2d 798 (Ind. 2004).

3. 28 U.S.C. §§ 2671-2680 (2000).

4. *Simon*, 805 N.E.2d at 800-01.

5. *Id.* at 801 (citing 28 U.S.C. §§ 1346(b), 2674; *Richards v. United States*, 369 U.S. 1 (1962)).

invoking the rule that “if there is a true conflict between the choice-of-law rules of the two jurisdictions, it will apply the law of the place where the last significant act or omission occurred, in this case[,] Indiana.”⁶

The court in *Simon* identified two “true conflicts” between Indiana and D.C. choice-of-law rules, which required analysis: “(1) the use of *dépeçage* and (2) the role of [underlying] policy.”⁷ In addressing the use of *dépeçage* (and confirming the rationale for Indiana’s historical rejection of the doctrine), the court reasoned that “[b]y making separate determinations for each issue within a claim, the process amalgamates the laws of different states, producing a hybrid that may not exist in any state.”⁸ Further, the court stated that “[d]*épeçage* may also produce unfair results because the hybrid law may be more favorable to one party than another, allowing a result that could not be reached if the laws of any one state were applied.”⁹ Because D.C. recognizes *dépeçage*, the court found that a “true conflict” exists between the choice-of-law rules of D.C. and Indiana.¹⁰

Next, having ruled that Indiana choice-of-law rules applied, the court in *Simon* addressed whether the substantive law of Indiana or Pennsylvania would apply to the plaintiffs’ wrongful death claims.¹¹ In holding that Indiana law would apply, the court reaffirmed its ruling in *Hubbard Manufacturing Co. v. Greeson*,¹² where it held that if the relationship of the state in which the last act giving rise to tort liability was committed is insignificant to the action, a court should apply the law of the state with the most significant relationship to the

6. *Id.*

7. *Id.*

8. *Id.* at 802.

9. *Id.* at 803 (explaining that a party “should not be allowed to put ‘together half a donkey and half a camel, and then ride to victory on the synthetic hybrid’”) (quoting Christopher G. Stevenson, Note, *Depeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 IND. L. REV. 303, 320 (2003)).

10. *Id.* Regarding the second “true conflict” identified by the court in *Simon*, the court confirmed that Indiana “does not require that courts undertake the difficult and ultimately speculative task of identifying the policies underlying the laws of multiple states and weighing the potential advancement of each in the context of the case.” *Id.* According to the court, Indiana courts “simply look at the contacts that exist between the action and the relevant states and determine which state has the most significant relationship with the action.” *Id.* (citing *Jean v. Dugan*, 20 F.3d 255, 261 (7th Cir. 1994); *Cap Gemini Am., Inc. v. Judd*, 597 N.E.2d 1272, 1282 (Ind. Ct. App. 1992)).

11. Three areas were identified where Indiana law differed from that of Pennsylvania: “(1) ‘Pennsylvania allows joint-and-several liability and right of contribution, while Indiana does not;’ (2) unlike Pennsylvania, ‘Indiana does not permit recovery for *both* wrongful death and survival damages; and (3) unlike Indiana, Pennsylvania damages include the decedent’s conscious pain and suffering from the moment of injury to the time of death.’” *Id.* at 805 (internal citations omitted) (quoting *Simon v. United States*, 341 F.3d 193, 204-05 (3d Cir. 2003)).

12. 515 N.E.2d 1071 (Ind. 1987).

case.¹³ In other words, the court in *Simon* confirmed Indiana's "liberalized" *lex loci* analysis, in which a court must first determine whether the place where the tort was committed is significant to the action. If it is, that state's law applies. If the state in which the tort was committed is insignificant to the action, the court must consider "what other contacts exist and evaluate them according to their relative importance to the litigation at hand."¹⁴

The court in *Simon* found that the place of the tort—Kentucky, where the plane crashed—was insignificant to the action.¹⁵ The court considered that the negligence at issue occurred in Indiana and D.C., and that none of the victims or the parties were residents of Kentucky.¹⁶ In evaluating the second step of the *Hubbard* analysis, the court found that, between Indiana and D.C., the "conduct in Indiana was more proximate to the harm, and none of the parties [were] arguing that D.C. law should apply."¹⁷ Therefore, the court held that Indiana had a more significant relationship with the case and Indiana law would apply.¹⁸

In *Baca v. New Prime, Inc.*,¹⁹ the defendant in a negligence action with multi-state connections asserted as an affirmative defense that "Indiana law would support a claim for injury due to wanton or willful behavior but not due to ordinary negligence."²⁰ The trial court concluded that Indiana law governed. The plaintiff appealed, and the Indiana Court of Appeals affirmed.²¹ The Indiana Supreme Court granted transfer.

The Indiana Supreme Court in *Baca* remanded the case to the trial court for further consideration in light of the decision in *Simon*.²² The court confirmed that in *Simon*, it "re-affirmed [its] leading case on *lex loci delicti*, *Hubbard Manufacturing Co. v. Greeson* . . . , and indicated that [it] had elected not to adopt the Restatement (Second) of Conflict of Laws."²³ Further, the court stated that in *Simon*, it "considered for the first time whether Indiana choice-of-law doctrine embraces *dépeçage*, the process of applying separately the law of different states within the same case."²⁴ The court confirmed that it "declined to adopt *dépeçage*, saying [it] would not 'separately analyze and apply the law of different jurisdictions to issues within each claim' of a suit."²⁵

Recognizing that the holding in *Simon* would not necessarily lead to a

13. *Simon*, 805 N.E.2d at 805-06 (discussing the two-step *Hubbard* analysis).

14. *Id.* at 806 (stating that the court will "apply the law of the state with the most significant relationship to the case").

15. *Id.*

16. *Id.*

17. *Id.* at 807.

18. *Id.*

19. 810 N.E.2d 711 (Ind. 2004).

20. *Id.* at 712.

21. *Id.*

22. *Id.* at 713.

23. *Id.* at 712 (citations omitted).

24. *Id.* at 712-13.

25. *Id.* at 713 (citing *Simon*, 805 N.E.2d at 802).

different resolution than that reached by the trial court and the court of appeals in the case, the court in *Baca* noted that “neither party took into account the applicability or inapplicability of the doctrine of *dépeçage*” and remanded the case to “give the parties and those courts a chance to brief and consider the issues with [the] benefit of [the] recent decision.”²⁶

B. Amendment of Pleadings—Relation Back of Cross-Claim

Under Trial Rule 15(A), “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires.”²⁷ In *Gill v. Pollert*,²⁸ a paving company that demolished a damaged hotel sued the hotel owners, their insurer and the insurance agency, seeking to recover payment and to foreclose on a mechanic’s lien.²⁹ The hotel owners filed a cross-claim against their insurer and agent. The insurer and agent argued that the cross-claim was barred by the applicable statute of limitations, because the owners had not sought and obtained leave of court before the limitations period expired.³⁰

First, the court in *Gill* addressed whether the failure to request leave of court at the time the cross-claim was filed rendered the filing a “procedural non-entity,” where leave was subsequently requested and granted.³¹ The court ruled that the filing was valid, given the later request for leave and order “authorizing” the filing.³²

Next, the court addressed the issue of whether the cross-claim “relates back to the date of the original pleading.”³³ According to the court, the “original pleading” for purpose of Rule 15(C) analysis was the original answer filed by the hotel owners to the plaintiff’s complaint. The answer admitted and denied various allegations of the complaint, which was based on the demolition services performed.³⁴ The court thus found that the cross-claim “arose out of the conduct, transaction, or occurrence” referred to in the answer.³⁵

26. *Id.*

27. IND. TRIAL R. 15(A).

28. 810 N.E.2d 1050 (Ind. 2004).

29. *Id.* at 1052-53.

30. *Id.* at 1053-54. The cross-claim was filed within the two-year statute of limitations. The cross-defendants waited eight months to file an answer or other response, apparently assuring counsel for the owners that a response would be filed. *Id.* at 1053. Finally, two days after the two-year period expired, the cross-defendants filed a motion to dismiss the cross-claim, arguing that the owners had not sought and obtained leave to file it and that, therefore, the cross-claim was barred by the statute of limitations. *Id.* Two days later, the owners filed a motion requesting “that their cross-claim . . . be allowed.” *Id.*

31. *Id.* at 1054-55.

32. *Id.*

33. *Id.* at 1055 (quoting IND. TRIAL R. 15(C)).

34. *Id.*

35. *Id.* (quoting IND. TRIAL R. 15(C)).

Pursuant to Rule 15(C), “[w]hen a claim asserted in an amended pleading arises out of the allegations of the original pleading,” an amendment

“changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment” satisfies two conditions: [1] timely notice of the institution of the action and [2] actual or constructive knowledge of a mistake in identity.³⁶

In *Gill*, the court recognized that the second factor—a mistake of identity—was not satisfied. However, the court clarified that the two conditions apply only as to a party “to be brought in” by the amendment.³⁷ Since the cross-defendants in *Gill* were not new parties, but were already in the case as co-defendants, relation back of the amended pleading was not limited by the timely notice and mistaken identity conditions of the Rule.³⁸ Thus, the court held that the cross-claim related back to the date of the original answer.³⁹

C. Arbitration

1. *Arbitration of Counterclaim*.—In *Theising v. ISP.com LLC* (the “Marion County case”),⁴⁰ and *ISP.com LLC v. Theising* (the “Hamilton County case”),⁴¹ the Indiana Supreme Court ordered claims of a receiver on a promissory note to arbitration, despite that the promissory note did not contain an arbitration clause. The court’s rulings demonstrate that despite the absence of an agreement to arbitrate the primary claim, a defendant can require arbitration of the primary claim by asserting a counterclaim that provides an offset to the primary claim, if the counterclaim is subject to an arbitration provision.

In the Marion County case, the defendants (“ISP”) issued a promissory note in connection with the sale of the assets of IQuest, to the majority shareholder of IQuest, Robert Hoquim. Hoquim and ISP also entered into a Loan and Security Agreement and an Asset Purchase Agreement, which contained a mandatory

36. *Id.* at 1055-56 (quoting IND. TRIAL R. 15(C)).

37. *Id.* at 1056 (emphasis in original).

38. *Id.*

39. *Id.* The court in *Gill* also clarified that a cross-claim against an existing party does not require additional service of process under Trial Rule 4(A). *Id.* Finally, the court ruled that an intervening judgment in favor of the insurer against the plaintiff did not constitute res judicata in connection with the cross-claim, since the judgment was “not between the same parties on the same claim.” *Id.* at 1056-57.

40. 805 N.E.2d 778 (Ind. 2004) (the “Marion County case”).

41. 805 N.E.2d 767 (Ind. 2004) (the “Hamilton County case”). In the Hamilton County case, the Indiana Supreme Court concluded that the provisions of the note and the Loan and Security Agreement did not override the undertaking to arbitrate disputes “relating to” the Asset Purchase Agreement, which contained the arbitration clause. *Id.* at 776-77. The court also held that the receiver had the rights and obligations of IQuest, but was not authorized to assert claims of creditors or third parties. *Id.* at 775.

arbitration provision.⁴² After the transactions were completed, Hoquim died intestate and IQuest was placed in receivership. Hoquim's estate sued ISP and its guarantors on the promissory note. As IQuest's receiver, Theising obtained an order from the probate court directing that the note be transferred to him.⁴³

ISP moved to compel arbitration, arguing that under the Asset Purchase Agreement, they were entitled to certain offsets against any amounts arguably owed under the promissory note. As such, ISP argued, the entire dispute must be arbitrated.⁴⁴ Specifically, the arbitration provision in the Asset Purchase Agreement required arbitration of disputes "relating to" the Asset Purchase Agreement.⁴⁵ In ruling that the entire dispute should be arbitrated, the supreme court explained the following:

The amounts due under the note are ultimately resolved by the degree to which ISP is entitled to set off "Indemnity Obligations" of IQuest and Hoquim against the amounts due under the note. Hoquim's rights under the note, and therefore the receiver's rights under the note, are dependent on resolution of those disputes. Hoquim and IQuest agreed to arbitrate those disputes, and that undertaking is binding on Theising as their successor in interest.⁴⁶

The Indiana Supreme Court affirmed the trial court's ruling compelling arbitration.⁴⁷

2. *Incorporation by Reference and Waiver.*—In *MPACT Construction Group, LLC v. Superior Concrete Constructors, Inc.*,⁴⁸ one of several subcontractors on a project filed an action to foreclose its mechanic's lien against the general contractor and property owner. The general contractor filed a cross-claim against the owner for breach of contract and to foreclose its mechanic's lien.⁴⁹ The general contractor then filed a motion to stay the litigation and compel arbitration, pursuant to an arbitration clause contained in the contract between the general contractor and the owner. The supreme court in *MPACT* analyzed two primary issues: (1) whether the language of the relevant

42. *Theising*, 805 N.E.2d at 779.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 780.

47. *Id.* The Marion County case involved the trial court's refusal to set aside the original judgment ordering the dispute to arbitration. The receiver, Theising, failed to respond to the motion to compel arbitration, the trial court granted the motion, and Theising moved to set aside the judgment under Indiana Trial Rule 60(B). *Id.* The Indiana Supreme Court in *Theising* did not address the "excusable neglect" in the failure to respond to the motion to compel arbitration, since its ruling that arbitration was required rejected Theising's argument relating to any "meritorious defense." See IND. TRIAL R. 60(B).

48. 802 N.E.2d 901 (Ind. 2004).

49. *Id.* at 903. Several counterclaims and cross-claims for the foreclosure of mechanic's liens and for breach of contract were filed among the various parties. *Id.*

subcontracts sufficiently incorporated the arbitration clause of the general contract, thus requiring arbitration of the subcontractor's claims, and (2) whether MPACT waived its right to arbitrate by "participating in the litigation."⁵⁰

In support of its argument that the subcontracts incorporated the general agreements, including the arbitration clause, the general contractor relied on language in the subcontracts stating that "[t]he contract documents are complementary and what is required by any one shall be as binding as if required by all."⁵¹ In response, the subcontractor argued that the provisions of the general contract were incorporated "for the limited purpose of governing the work to be performed," emphasizing that the above-quoted language was "preceded and followed by sentences pertaining specifically to work, and that this limits the effect of [the quoted sentence]."⁵²

The Indiana Supreme Court agreed with the subcontractor, finding that, at most, the language of the subcontracts was ambiguous. Applying the axiom of contract interpretation that "[w]hen there is ambiguity in a contract, it is construed against its drafter,"⁵³ the court found that it was "clear that arbitration was not sufficiently discussed by the parties."⁵⁴ The court concluded that "there was no meeting of the minds between the parties on the issue of arbitration" and "there was no agreement to arbitrate."⁵⁵

On the issue of waiver, the court stated the general rule that "[w]hether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate."⁵⁶ In other words, a party may waive the right to arbitrate its dispute by "actively participating in the litigation."⁵⁷

50. *Id.* at 910. The court in *MPACT* preceded its analysis with the threshold question of whether the Federal Arbitration Act (the "FAA") preempted Indiana law to determine whether the subcontractors agreed to arbitrate their disputes, concluding that Indiana law applied to the determination. *Id.* at 904-06 (finding that the FAA, 9 U.S.C. §§ 1-16 (2000), which applies to written arbitration provisions contained in contracts involving interstate commerce, did not preempt Indiana law, since the FAA contained no express preemptive provision, it does not reflect a congressional intent to occupy the entire field of arbitration, and Indiana policy favors arbitrations). The court explained that "[i]f a court, fairly applying generally applicable state law contract principles and not singling out arbitration agreements for hostile treatment, finds that the parties did not agree to arbitrate, then federal law does not preempt." *Id.* at 906 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

51. *Id.* at 908.

52. *Id.*

53. *Id.* at 910 (citing *Philco Corp. v. "Automatic" Sprinkler Corp. of Am.*, 337 F.2d 405, 408 (7th Cir. 1964); *Smith v. Sparks Milling Co.*, 39 N.E.2d 125, 135 (Ind. 1942); *Bicknell Minerals, Inc. v. Tilley*, 570 N.E.2d 1307, 1313 (Ind. Ct. App. 1991)).

54. *Id.*

55. *Id.*

56. *Id.* (stating that the waiver issue "requires an analysis of the specific facts in each case") (citation omitted).

57. *Id.* (citing *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 757-58

In *MPACT*, the general contractor—the party alleged to have waived its right to arbitrate—filed a cross-claim against the property owner for breach of contract, and filed cross-claims and counterclaims against the owner and the various subcontractors to foreclose its mechanic's liens.⁵⁸ It also participated in telephone conferences and a scheduling conference where summary judgment deadlines and a trial date were scheduled.⁵⁹

The supreme court held that the general contractor's "participation" in the litigation was insufficient to constitute a waiver of its right to arbitrate. The court recognized that "[a] party should not be held to have waived its right to arbitrate when, in response to a complaint filed against it, it raises counterclaims in order to preserve them."⁶⁰ In other words, the court found that a party will not waive its right to arbitrate by asserting a compulsory counterclaim. Further, the court determined that arbitration was not waived, despite that the contractor also asserted cross-claims that were not compulsory. Significant to the court's ruling was the fact that the contractor asserted its arbitration demand, and expressly stated that it was not waiving its right to arbitration, in its answer and affirmative defenses.⁶¹

The *Theising* and *MPACT* decisions do not address issues of first impression regarding enforcement of arbitration agreements against third-parties or whether a party may have waived its right to arbitrate a dispute by "participating" in the litigation. Nevertheless, because motions to compel arbitration often turn on close analyses of the relevant contract provisions and are inevitably extremely fact-sensitive, the supreme court's decisions provide valuable guidance to practitioners in crafting arguments for their particular cases.

D. Small Claims—Application of Trial Rule 12(B)

In *Niksich v. Cotton*,⁶² the Indiana Supreme Court analyzed the differences between pleading requirements in small claims court and those imposed on litigants in an ordinary civil action in state court, and held that a Notice of Claim in small claims court can be dismissed pursuant to Trial Rule 12(B)(6), when "it is apparent from the complaint that the pleader is not entitled to relief."⁶³

(7th Cir. 2002); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992)).

58. *Id.*

59. *Id.*

60. *Id.* at 910-11 (citing *Underwriting Members of Lloyds of London v. United Home Life Ins. Co.*, 549 N.E.2d 67, 71 (Ind. Ct. App. 1990)).

61. *Id.* at 911. The supreme court's ruling on this issue also might be used to support arguments outside the context of arbitration (e.g., relating to personal jurisdiction or service of process)—that an issue or argument has been preserved, despite subsequent actions inconsistent therewith, by simply alleging the issue or argument in a conclusory fashion in the litigant's first filing in the matter.

62. 810 N.E.2d 1003 (Ind. 2004), *cert. denied*, 125 S. Ct. 1073 (2005).

63. *Id.* at 1006.

Niksich involved an incarcerated individual, Niksich, who claimed that employees of the correctional facility damaged his television. Niksich delivered a Tort Claims Act notice, and then filed a notice of claim with the small claims court in Madison County.⁶⁴ The defendants moved to dismiss the notice of claim, pursuant to Trial Rule 12(B)(6).⁶⁵

Overruling the court of appeals, the Indiana Supreme Court held that Rule 12(B) can apply to a small claims case, but that a lower pleading standard must be applied in small claims cases than that applied in ordinary civil actions.⁶⁶ The court explained that:

[A] small claims notice of the claim is not required to set forth facts establishing a right to recover. Rather, small claims courts are intended to be used by non-lawyers. A notice of claim is sufficient if it sets forth . . . a “brief statement of the nature of the claim.” This more relaxed standard may be met by setting forth facts sufficient to identify the dispute, even if facts essential to recovery are not alleged.⁶⁷

The court concluded that “[a]lthough a small claims ‘notice of claim’ is granted substantial leeway, a motion to dismiss may nevertheless be appropriate in some cases.”⁶⁸ The court stated that “a small claims case may be dismissed when it is apparent from the complaint that the pleader is not entitled to relief.”⁶⁹

The court in *Niksich* elaborated on its holding, directing that other Rule 12(B) motions are also permissible in small claims court:

Other Rule 12(B) motions may also be appropriate in small claims actions. Lack of personal or subject matter jurisdiction, insufficient process, and a host of other dispositive issues are properly asserted by motion. In sum, a 12(B)(6) motion may not dismiss a claim in small claims court when a plaintiff merely fails to plead the facts of a claim that would be required of a complaint subject to the Trial Rules. But if a dispositive issue is revealed by the notice of claim, a 12(B)(6) motion is available, just as other Rule 12 motions may be made in small claims actions.⁷⁰

The court found that Niksich should have been granted leave to amend his notice

64. *Id.* at 1004. See generally Indiana Torts Claims Act § 5(c), IND. CODE § 34-13-3-5(c) (2004) (describing required allegations in a complaint against a government employee in the employee’s individual capacity).

65. *Niksich*, 810 N.E.2d at 1005.

66. *Id.* at 1005-06.

67. *Id.* The court noted that a civil complaint subject to a Trial Rule 12(B)(6) motion for “failure to include essential facts may nonetheless be sufficient to present a claim in a small claims court.” *Id.* at 1006.

68. *Id.*

69. *Id.*

70. *Id.*

of claim to correct the deficiencies.⁷¹ However, the court expressed an apparent disfavor for the claims, gratuitously stating that “[w]hether Niksich can successfully establish any of his claims is, of course, another matter.”⁷²

E. Preservation of Issue for Appeal—Allegation in Complaint Insufficient

In *Endres v. Indiana State Police*,⁷³ the plaintiff, an Indiana State Trooper, refused to accept an assignment as a gaming agent at a riverboat casino, asserting that the assignment conflicted with his religious convictions.⁷⁴ The plaintiff alleged both federal and state constitutional claims in his complaint. Regarding the state constitutional claims, the court found that the appendix submitted by the plaintiff was incomplete and that there was nothing in the materials submitted by either party to indicate that the plaintiff “offered any legal argument in support of his State constitutional claim until he filed his motion to correct error in the trial court.”⁷⁵

The supreme court held that “the mere listing of a contention in a party’s complaint, with no further attempt to press the contention in the trial court, is insufficient effort to preserve the matter for appellate review.”⁷⁶ “At a minimum,” according to the court, a party “must show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.”⁷⁷

F. Administrative Law and Procedure

1. *Standing to Seek Administrative Review.*—In *Huffman v. Indiana Office of Environmental Adjudication*,⁷⁸ the court clarified that “the rules for determining whether [a] person has ‘standing’ to file a lawsuit do not apply” to a petition for administrative review under the Administrative Orders and Procedures Act (“AOPA”).⁷⁹ Under the AOPA, to qualify for administrative review of an agency order, a person must state facts demonstrating that “[1] the petitioner is a person to whom the order is specifically directed; [2] the petitioner is aggrieved or adversely affected by the order, or [3] the petitioner is entitled to review under any law.”⁸⁰ This standard is lower than the standard for standing in a judicial proceeding, which requires a plaintiff to have a “justiciable interest

71. *Id.* at 1008.

72. *Id.*

73. 809 N.E.2d 320 (Ind. 2004).

74. *Id.* at 321.

75. *Id.*

76. *Id.* at 322.

77. *Id.* The court in *Endres* stated that the policy reasons behind its ruling applied “with particular force where . . . the claim is a constitutional one.” *Id.*

78. 811 N.E.2d 806 (Ind. 2004).

79. *Id.* at 808.

80. *Id.* at 810 (quoting IND. CODE § 4-21.5-3-7(a)(1) (2004)).

in the controversy.”⁸¹ The court in *Huffman* ruled that a property owner had standing to seek administrative review of the renewal of a permit issued to Eli Lilly by the Indiana Department of Environmental Management.⁸²

The Indiana Court of Appeals also addressed the issue of standing under the AOPA during the survey period, and distinguished the facts in *Huffman*.⁸³ In *Indiana Ass’n of Beverage Retailers*, the court of appeals held that a non-profit industry association had standing under the AOPA to seek judicial review of an Alcohol and Tobacco Commission (“ATC”) order granting an application for a beer and wine permit to the owner of a gas station and convenience store.⁸⁴

The court of appeals discussed its own decision in *Huffman v. Indiana Department of Environmental Management*⁸⁵ at length, and explained that the petitioner in *Huffman* alleged that she was “aggrieved or adversely affected” by the administrative agency’s decision.⁸⁶ In the present case, the court of appeals explained, the industry association “actively participated in the proceedings and remonstrated against [the owner’s] application for the alcohol permit.”⁸⁷ Further, the association “presented the testimony of witnesses at the hearings, and [the] administrative code specifically provides that [the association], as a remonstrator, is entitled to receive notice in these types of proceedings and may participate in appeals to the ATC.”⁸⁸ Thus, the court did “not find the *Huffman* rationale controlling” and concluded that the industry association had standing to petition for judicial review.⁸⁹

2. *Use of Discovery in Administrative Proceedings.*—In *Board of School Commissioners v. Walpole*,⁹⁰ a divided supreme court held that Indiana Trial Rule 28(F), which addresses discovery proceedings before administrative agencies, does not apply to a school board when it decides whether to terminate a teacher’s contract under the Teacher Tenure Act.⁹¹ The court reasoned that “when a school board acts to determine whether a teacher’s employment should be terminated, the board does not act as an administrative agency as that term is used in Rule

81. *Id.*

82. *Id.* at 815-16.

83. *See Ind. Ass’n of Beverage Retailers, Inc. v. Ind. Alcohol & Beverage Comm’n*, 809 N.E.2d 374 (Ind. Ct. App. 2004).

84. *Id.* at 379.

85. 788 N.E.2d 505 (Ind. Ct. App. 2003), *vacated by* 811 N.E.2d 806 (Ind. 2004).

86. *Ind. Ass’n of Beverage Retailers, Inc.*, 809 N.E.2d at 379 (citing *Huffman*, 788 N.E.2d at 507). The *Indiana Association* decision was rendered in May 2004. The court of appeals recognized that the supreme court had granted transfer in *Huffman* as of the date of its decision, but determined that because the facts in *Huffman* were distinguishable, the ultimate ruling by the supreme court would not affect its decision. *Id.*

87. *Id.*

88. *Id.* (citing IND. AMIN. CODE tit. 905, r. 1-36-2, -3(b)).

89. *Id.*

90. 801 N.E.2d 622 (Ind. 2004).

91. *Id.* at 626.

28(F).”⁹² “In that context,” the court explained, “the school board is not performing typical agency action, [such as] acting as a regulator, setting rates or issuing licenses, or otherwise affecting members of the public.”⁹³ Rather, the court concluded that the school board “is performing a managerial act, essentially acting as an employer dealing with the internal operations of its organization.”⁹⁴

Justice Sullivan dissented, unable to reconcile Trial Rule 52(A)(2)’s application to judicial review of Teacher Tenure Act terminations with the majority’s holding that Rule 28(F), despite using the same “administrative agency” expression, does not apply to Tenure Act terminations.⁹⁵ Justice Sullivan cautioned that “[w]ithout the opportunity for discovery that [Rule] 28(F) provides, an accused teacher may not have the opportunity to place his or her side of the story in the record.”⁹⁶

3. *Failure to Respond to Proposed Notice of Default.*—In *Breitweiser v. Indiana Office of Environmental Adjudication*,⁹⁷ the court held that while a party is not compelled under the Administrative Orders and Procedures Act (“AOPA”) to file a response to an administrative law judge’s proposed notice of default, the Act requires the judge to issue a default ruling if the party elects not to submit a response.⁹⁸ In *Breitweiser*, the defaulting party had filed a motion to disqualify the presiding judge. However, the pending motion to disqualify did not save the party from the statutory consequences of his failure to respond to the notice of default.⁹⁹

II. INDIANA COURT OF APPEALS DECISIONS

A. Trial Rule Interpretation and Construction

1. *Procedural Rule Controls Over Conflicting Statute.*—In *Bowyer v. Indiana Department of Natural Resources*,¹⁰⁰ the court of appeals reaffirmed and applied the rule that when the provisions of a statute conflict with those of a trial procedural rule, the procedural rule controls. In *Bowyer*, the Department of Natural Resources (“DNR”) filed an action against a former landowner and

92. *Id.* at 624-25.

93. *Id.* at 625.

94. *Id.*

95. *Id.* at 626.

96. *Id.* at 626-27 (“This is especially important where the administrative agency is the school board—which effectively operates as prosecutor, judge, and jury in teacher termination proceedings.”).

97. 810 N.E.2d 699 (Ind. 2004).

98. *Id.* at 702-03. Pursuant to Indiana Code section 4-21.5-3-24(b), a party “may” file a written motion against a proposed notice of default. However, section 4-21.5-3-24(c) provides that if a party fails to file a written motion under subsection (b), the administrative law judge “shall” issue the default order. *Id.* (citing IND. CODE § 4-21.5-3-24(b)-(c) (2002)).

99. *Id.*

100. 798 N.E.2d 912 (Ind. Ct. App. 2003).

purchaser of land, seeking to enjoin illegal dumping of debris into a lake.¹⁰¹ After the trial court entered a judgment in favor of the DNR, the defendants continued to engage in objectionable construction activities.¹⁰² Without notice to the defendants, the DNR filed for and the trial court entered a temporary restraining order, prohibiting construction activities until the “cause [was] fully determined.”¹⁰³

The restraining order obtained by the DNR was granted pursuant to section 14-26-2-19(b) of the Indiana Code which provides the following:

If a defendant continues to violate this chapter after the service of notice of the action and before trial, the plaintiff is entitled, upon a verified showing of the acts on the part of the defendant, to a temporary restraining order without notice. The temporary restraining order is effective until the cause has been tried and determined.¹⁰⁴

On its face, the statute appears to dispense with many of the safeguards dictated by Trial Rule 65(B), which requires a showing that an attempt was made to provide prior notice to the defendant, that justification exists for any failure to provide prior notice, and that irreparable injury will result before the defendant can be heard in opposition.¹⁰⁵

The court in *Bowyer* found that the statute relied upon by the DNR was “in direct conflict with Indiana Trial Rule 65(B).”¹⁰⁶ The court explained that the statute conflicted with the Trial Rule in that it did not require a party seeking a TRO to certify its efforts to contact the opposing party, it allowed the TRO to continue until the end of the litigation, and it required no hearing and no provision for dissolving the TRO.¹⁰⁷ Since the Trial Rules take precedence over a conflicting procedural statute, the court held that the defendants were not in contempt of the improperly issued TRO.¹⁰⁸

2. *Three Day Extension for Service by Mail.*—In *In re Marriage of Carter-McMahon*,¹⁰⁹ the court held as a matter of first impression that Trial Rule 6(E) does not apply to extend Trial Rule 59(C)’s thirty-day deadline for filing a motion to correct errors.¹¹⁰ Noting that “the rules of statutory construction . . . are applicable to the interpretation of trial rules,” the court explained that “as

101. *Id.* at 914.

102. *Id.*

103. *Id.*

104. IND. CODE § 14-26-2-19(b) (2004).

105. *See Bowyer*, 798 N.E.2d at 916 (citing IND. TRIAL R. 65(B)).

106. *Id.*

107. *Id.* at 917.

108. *Id.* at 920. Because the defendants did not challenge the TRO until after the contempt hearing, the court evaluated the failure to comply with the order, ultimately finding that the order was “inherently ambiguous and highly indefinite” and that, therefore, the defendants could not be held in contempt for a purported violation. *Id.* at 917-20.

109. 815 N.E.2d 170 (Ind. Ct. App. 2004).

110. *Id.* at 177-78.

with statutes, [its] objective when construing the meaning of a rule is to ascertain and give effect to the intent underlying the rule.”¹¹¹

Indiana Trial Rule 59(C) provides that a motion to correct error must be filed within “thirty days after *the entry of a final judgment* or an appealable final order.”¹¹² Rule 6(E) extends a deadline or prescribed period by three days, whenever the deadline or period begins to run “*after the service of a notice* or other paper . . . and the notice or paper is served . . . by mail.”¹¹³

The court in *Carter-McMahon* held that Rule 6(E) did not apply to extend the thirty-day deadline contained in Rule 59(C), because the thirty-day period begins to run upon the “entry” of the judgment, rather than after “service of a notice.”¹¹⁴ The court reasoned that “to conclude that Indiana Trial Rule 6(E)’s three-day extension applies to a motion to correct error would be an unauthorized judicial interpretation of plain language.”¹¹⁵

B. Service of Process

In *Swiggett Lumber Construction Co. v. Quandt*,¹¹⁶ the court of appeals set aside a default judgment on the ground that service of process was inadequate and, therefore, the trial court did not have personal jurisdiction to enter the judgment.¹¹⁷ The issue in *Swiggett* was whether defective service under Trial Rule 4.1(B)—copy service on an individual—could be cured by purported compliance with Trial Rule 4.15(F)—service “reasonably calculated to inform the person . . . that an action has been instituted.”¹¹⁸

111. *Id.* at 175 (citing *Noble County v. Rogers*, 745 N.E.2d 194, 197 n.3 (Ind. 2001); *Turner v. Bd. of Aviation Comm’rs*, 743 N.E.2d 1153, 1161 (Ind. Ct. App. 2001)). The court also stated that “the Rules of Trial Procedure are to be construed together and harmoniously if possible.” *Id.* (quoting *Rumfelt v. Himes*, 438 N.E.2d 980, 983 (Ind. 1982)).

112. IND. TRIAL R. 59(C) (emphasis added).

113. IND. TRIAL R. 6(E) (emphasis added).

114. *Carter-McMahon*, 815 N.E.2d at 175, 177-78.

115. *Id.* at 176. The motion to correct error in *Carter-McMahon* was filed by an ex-wife in connection with a dissolution proceeding, and it was filed on the thirty-third day, in reliance on Rule 6(E). The court stated the following regarding its strict ruling: “We are mindful of the harshness of this result and reiterate the preference for deciding cases on their merits when possible. However, faced with this particular scenario, the trial court correctly dismissed as untimely [the] motion to correct error.” *Id.* at 177-78. The *Carter-McMahon* decision will likely be cited by litigants in various contexts to support arguments relating to procedural deadlines missed by short periods of time.

116. 806 N.E.2d 334 (Ind. Ct. App. 2004).

117. *Id.* at 338. In *Swiggett*, the plaintiff made several attempts at service, including leaving a copy of the complaint and summons in the mail slot to the defendant’s business and service on an unidentified employee of the defendant. These attempts were not, however, followed by mailing the summons to the defendant’s last known address as required by Indiana Trial Rule 4.1(B).

118. *Id.* at 337 (quoting IND. TRIAL R. 4.1, 4.15(F)). Rule 4.15(F) provides that no summons or service of process shall be set aside or adjudged insufficient if either is “reasonably calculated

In finding that the plaintiff's defective service was not saved by Rule 4.15(F), the court in *Swiggett* reiterated the proposition that Trial Rule 4.1(B) is "unambiguously mandatory" and that Rule 4.15(F) "will not excuse noncompliance."¹¹⁹ While Indiana courts have held that "failure to technically comply with the trial rules will not defeat a trial court's jurisdiction so long as a party substantially complies with the trial rules,"¹²⁰ the court noted that in this case, "there was no attempt whatsoever to comply with [Rule] 4.1(B)."¹²¹ Thus, *Swiggett* implies that had the plaintiff therein at least attempted to comply with Rule 4.1(B) by mailing the pleadings to the defendant's last known address, Rule 4.15(F) may have applied to cure any technical defects.

C. Jurisdiction

1. *Jurisdiction over the Case.*—There are three types of jurisdiction: (1) jurisdiction of the person, (2) jurisdiction of the subject matter, and (3) jurisdiction over the particular case.¹²² Subject matter jurisdiction refers to "the power of courts to hear and decide a class of cases."¹²³ The issue of subject matter jurisdiction is resolved by "determining whether the claim involved falls within the general scope of authority conferred on the court by the Indiana Constitution or by statute."¹²⁴ "When Courts lack subject matter jurisdiction, their actions are void *ab initio* and may be attacked at any time."¹²⁵ "However, jurisdiction over the particular case refers to a trial court's right, authority, and power to hear and decide a specific case within the class of cases over which a court has subject matter jurisdiction."¹²⁶ A judgment by a court that lacks jurisdiction over the particular case is "voidable and requires a timely objection or the lack of jurisdiction over the particular case is waived."¹²⁷

In *Kondamuri v. Kondamuri*, a husband filed for dissolution of marriage and the wife filed a motion to dismiss, challenging the trial court's jurisdiction on the ground that the husband had not resided in Indiana for the six months prior to the filing of his petition.¹²⁸ The trial court granted the motion to dismiss, and the

to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond." IND. TRIAL R. 4.15(F).

119. *Swiggett*, 806 N.E.2d at 337-38 (citing *Barrow v. Pennington*, 700 N.E.2d 477, 479 (Ind. Ct. App. 1998)).

120. *Id.* at 338 (quoting *Pennington*, 700 N.E.2d at 479).

121. *Id.*

122. See *Kondamuri v. Kondamuri*, 799 N.E.2d 1153, 1156 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 799 (Ind. 2004).

123. *Id.*

124. *Id.* (citing *Adler v. Adler*, 713 N.E.2d 348, 352 (Ind. Ct. App. 1999)).

125. *Id.* (citing *In re Guardianship of K.T.*, 743 N.E.2d 348, 351 (Ind. Ct. App. 2001)).

126. *Id.*

127. *Id.* at 1156-57.

128. *Id.* at 1156. The residency requirements for a dissolution action are found in Indiana Code section 31-15-2-6, which provides that at the time of the filing of a petition, at least one of

husband appealed, arguing that the residency requirement implicates the court's jurisdiction over the particular case—not the subject matter jurisdiction of the trial court. As such, the husband argued, the wife waived her objection to jurisdiction by seeking “affirmative relief” from the trial court.¹²⁹

The court of appeals in *Kondamuri* agreed that “the failure to meet the residency requirements for filing a dissolution action implicates a trial court’s jurisdiction over a particular case rather than its subject matter jurisdiction.”¹³⁰ In this case, the husband argued that the wife’s jurisdiction objection was waived because she “sought affirmative relief from the court.”¹³¹ Specifically, the wife filed a motion to continue a hearing, and her motion included a request “for all other just and equitable relief in the premises.”¹³² The court found that “seeking an extension of time is not the type of affirmative relief that waives a party’s ability to impose a jurisdictional defense.”¹³³ Further, the court stated that the wife’s request “‘for all other just and equitable relief in the premises’ . . . neither vitiated her motion to dismiss nor barred her pending objection to the trial court’s jurisdiction.”¹³⁴ The trial court’s order dismissing the petition was affirmed.¹³⁵

2. *Subject Matter Jurisdiction.*—In *Borsuk v. Town of St. John*,¹³⁶ the court of appeals demonstrated that the defense of lack of subject matter jurisdiction cannot be waived, even under the extreme circumstances of that case. In *Borsuk*, landowners brought an action for certiorari, contending that the town’s refusal to rezone certain land was arbitrary, capricious and unreasonable.¹³⁷ The trial court granted summary judgment in favor of the town and the landowners appealed. The court of appeals reversed the trial court’s decision and remanded

the parties “must have been . . . a resident of Indiana . . . for six (6) months immediately preceding the filing of the petition.” IND. CODE § 31-15-2-6 (2004).

129. *Kondamuri*, 799 N.E.2d at 1156.

130. *Id.* at 1158. The court recognized that “[u]nlike the lack of subject matter jurisdiction, the lack of jurisdiction over the particular case must be raised at the earliest opportunity possible or the objection is waived.” *Id.* at 1158-59. Further, a party shall be “estopped from challenging the court’s jurisdiction where the party has voluntarily availed itself or sought the benefits of the court’s jurisdiction.” *Id.* at 1159.

131. *Id.*

132. *Id.*

133. *Id.* (citing *Mills v. Coil*, 647 N.E.2d 679, 681 (Ind. Ct. App. 1995)).

134. *Id.* at 1160.

135. *Id.* at 1161. The court in *Kondamuri* noted several times that the wife’s motion to dismiss was filed shortly after her attorney filed his appearance. *Id.* The court stated that “[b]ased on these facts, [it could] not find that [the w]ife’s discovery hearing continuance eliminated her ability subsequently to challenge the trial court’s jurisdiction.” *Id.* Had a longer period of time elapsed between the wife’s motion for a continuance and her motion to dismiss, it is unclear whether the court’s decision on waiver and timeliness would have been different.

136. 803 N.E.2d 1216 (Ind. Ct. App. 2004), *aff’d in part, vacated in part*, 820 N.E.2d 118 (Ind. 2005).

137. *Id.* at 1217-18.

the case for further proceedings.¹³⁸ The town petitioned the court of appeals for rehearing, arguing for the first time that the court lacked subject matter jurisdiction, because the landowners were not entitled to certiorari review of the rezoning decision.¹³⁹

The court in *Borsuk* found it “interesting” that

this [was] the first time during this litigation that the town addressed the issue of subject matter jurisdiction, even though the Town had an opportunity to attack the court’s jurisdiction at the trial court, in its submissions to [the court of appeals], and at oral argument before [the court of appeals].¹⁴⁰

The court, in fact, implied that the town’s delay was intentional: “It is evident to us that the Town ‘engaged in a bit of “rope-a-doping” here—a term commonly used in the sport of boxing. In such instances, one fighter pretends to be trapped against the ropes while his opponent wears himself out throwing punches.’”¹⁴¹ The court stated that the “result is an appalling waste of judicial resources.”¹⁴²

The court proceeded to rule that the court did have subject matter jurisdiction over the landowner’s claim. Specifically, the town acknowledged that the landowner could have brought a declaratory judgment action.¹⁴³ Because the landowner’s complaint contained “an invitation to declare that the town’s decision is arbitrary and capricious,” the court concluded that the complaint “makes out a request for a declaratory judgment based on the argument that the town’s decision was arbitrary.”¹⁴⁴

3. *Personal Jurisdiction*.—In *Saler v. Irick*,¹⁴⁵ the court had an opportunity to interpret the “doing business” provision of Indiana’s long-arm statute and, in doing so, disagreed with the definition of “doing business” given in an earlier decision of the court of appeals.¹⁴⁶ In *Saler*, stepchildren brought an action against the beneficiaries of their deceased stepmother’s payable-on-death accounts and annuities.¹⁴⁷ None of the beneficiaries lived in Indiana, but they did come to Indiana when they attempted to collect on the payable-on-death accounts.¹⁴⁸

The court began its discussion by outlining the two-step analysis followed by Indiana courts under the state’s long-arm statute:

138. *Id.* at 1217.

139. *Id.* at 1216-17.

140. *Id.* at 1217.

141. *Id.* (quoting *Beauchamp v. State*, 788 N.E.2d 881, 894 (Ind. Ct. App. 2003)).

142. *Id.*

143. *Id.*

144. *Id.*

145. 800 N.E.2d 960 (Ind. Ct. App. 2003).

146. *Id.* at 965-66 & n.5 (citing *Bryan Mfg. Co. v. Harris*, 459 N.E.2d 1199, 1204 (Ind. Ct. App. 1984)).

147. *Id.* at 963-64.

148. *Id.* at 964-65.

In determining whether an Indiana court has personal jurisdiction, a court must proceed with a two-step analysis. First, the court must determine if the defendant's contacts with Indiana fall under the "long-arm statute," Ind. Trial Rule 4.4. If the contacts fall under Rule 4.4, the court must then determine whether the defendant's contacts satisfy federal due process analysis.¹⁴⁹

The court determined that of the eight acts enumerated in Trial Rule 4.4 that will "render an individual to have submitted to the jurisdiction of Indiana[,] . . . the only one which may be applicable here is (A)(1)—"doing any business in this state."¹⁵⁰

The stepchildren argued that they were not "doing business" in Indiana when they attempted to collect on the payable-on-death accounts, because their actions did not meet the definition of "business."¹⁵¹ In their brief, they defined business as "a continuous or regular activity for the purpose of earning a livelihood."¹⁵² The court noted that *Black's Law Dictionary* defines "business" as "[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood."¹⁵³ The court stated that "business" for purposes of Rule 4.4 analysis is not limited to these definitions. Rather, the court favored "a more expansive definition of 'business'" when interpreting Rule 4.4.¹⁵⁴

The court found that "[a] common meaning attributed to 'business' is that of an 'affair' or 'matter.'"¹⁵⁵ The court also noted that a "similar definition is that of 'a special task, duty, or function.'"¹⁵⁶ Reading Rule 4.4 in light of the more expansive definitions of "business," the court ruled that by coming to Indiana for the purpose of attempting to collect on the payable-on-death accounts the beneficiaries "maintained contacts such that they fall within the long-arm jurisdiction of Indiana."¹⁵⁷

The court concluded that Indiana courts have personal jurisdiction over the beneficiaries on the payable-on-death accounts.¹⁵⁸ However, the court found that

149. *Id.* at 965 (internal citations omitted).

150. *Id.* The court recognized that effective January 1, 2003, Rule 4.4 contains a provision that states, "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States." *Id.* However, the new provision applies only to cases initiated after the announcement of the new rule. *Id.* (citing *Sneed v. Associated Group Insurance*, 663 N.E.2d 789, 795 (Ind. Ct. App. 1996), for the proposition that "new rules announced through a rulemaking process will only be applied to cases which arise after the new rule has been announced").

151. *Id.* at 965.

152. *Id.*

153. *Id.* (quoting BLACK'S LAW DICTIONARY 198 (6th ed. 1990)).

154. *Id.*

155. *Id.* at 966 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 302 (1976)).

156. *Id.* (citing WEBSTER'S NEW WORLD DICTIONARY 192 (2d college ed. 1982)).

157. *Id.*

158. *Id.* at 970.

the analysis did not apply to the claims against the beneficiaries relating to the annuities.¹⁵⁹ The court stated that “[t]he contacts which were made in Indiana that invoked application of the long-arm statute do not exist in relation to the annuities” and that “[t]here is no evidence that [the beneficiaries] did any acts within or connected to Indiana which were also related to the annuities.”¹⁶⁰ Therefore, the court held that “the prerequisite for an Indiana court obtaining specific personal jurisdiction under Trial Rule 4.4 does not exist.”¹⁶¹

D. Preferred Venue

In *Linky v. Midwest Midrange Systems, Inc.*,¹⁶² the court found that a contractual venue-selection clause entered into by one defendant creates preferred venue as to other defendants.¹⁶³ In *Linky*, a former employer sued two former employees and their new employer, alleging violations of non-competition clauses.¹⁶⁴ Both employees had entered into employment agreements with their former employer, but only one of the agreements contained a venue selection clause, selecting Indianapolis as the venue for any actions.¹⁶⁵ None of the defendants resided in Indianapolis or in Marion County. Rather, they resided in Kosciusko County.¹⁶⁶

The former employer filed a complaint in Marion County and the defendants filed a motion to transfer venue under Trial Rule 75, alleging that Marion County was not a preferred venue, and that preferred venue lies in Kosciusko County.¹⁶⁷ The court of appeals affirmed the trial court’s denial of the motion.¹⁶⁸ The court stated that “[i]t is clear from the record that venue properly lies in Marion County” based on the venue-selection clause in the employment agreement.¹⁶⁹ Further, the court concluded that “[i]f the venue in which the plaintiff files the case is preferred as to one defendant, then the venue is preferred as to all

159. *Id.*

160. *Id.*

161. *Id.* at 971. Finally, the court found that Indiana courts could not maintain *in rem* jurisdiction over the decedent’s property. *Id.* at 971-72.

162. 799 N.E.2d 55 (Ind. Ct. App. 2003).

163. *Id.* at 58.

164. *Id.* at 56.

165. *Id.*

166. *Id.* at 55-56.

167. *Id.* at 56.

168. *Id.* at 58.

169. *Id.* at 57. Indiana Trial Rule 75(A)(6) provides that preferred venue lies in “the county or court fixed by written stipulations signed by all the parties named in the complaint or their attorneys and filed with the court before ruling on the motion to dismiss.” Despite that the employment agreement containing the venue-selection clause was not signed by *all* of the defendants, the court reasoned that “[i]t would simply constitute a waste of judicial resources to sever the action” against the other employee and transfer it to Kosciusko County, “only to have him subsequently joined as a party to the action . . . in Marion County.” *Id.* at 58.

defendants.”¹⁷⁰

In *Lake Holiday Conservancy v. Davison*,¹⁷¹ the court clarified that the county of a plaintiff's residence is a county of preferred venue when a governmental organization is a defendant, regardless of whether the governmental organization has a principal office in the county.¹⁷² Trial Rule 75(A)(5) provides that preferred venue may be located in:

[t]he county where either one or more individual plaintiffs reside, the principal office of a governmental organization is located, or the office of a governmental organization to which the claim relates or out of which the claim arose is located, if one or more governmental organizations are included as defendants in the complaint.¹⁷³

In *Davison*, a boat passenger brought an action in Marion County against a conservancy district located in Montgomery County and others situated outside of Marion County, alleging that she was struck in the eye by a water balloon fired from a high-velocity slingshot while she was in a boat on a lake.¹⁷⁴ The conservancy district moved to transfer venue to Montgomery County arguing that Rule 75(A)(5) established preferred venue in the county in which the plaintiff resides only if the governmental organization also has a principal office in that county.¹⁷⁵

Applying “the cardinal rule of statutory construction that ‘a statute clear and unambiguous on its face need not and cannot be interpreted by a court,’” the court ruled that the county of the plaintiff's residence is a preferred venue, regardless of whether the governmental organization has a principal office in the county.¹⁷⁶ The court also recognized that the drafters of Rule 75(A) intended “to confer venue in the county where the plaintiff resides . . . only if the plaintiff chooses to sue a governmental entity, but not when the plaintiff sues only private defendants.”¹⁷⁷

E. Amendment of Pleadings

Indiana Trial Rule 15(A) provides that after a responsive pleading has been filed to an initial complaint, the complaining party may then amend that complaint “only by leave of court or by written consent of the adverse party.”¹⁷⁸ Further, Rule 15(A) provides that “leave shall be given when justice so

170. *Id.*

171. 808 N.E.2d 119 (Ind. Ct. App. 2004).

172. *Id.* at 123.

173. *Id.* at 122 (quoting IND. TRIAL R. 75(A)(5)).

174. *Id.* at 120.

175. *Id.* at 122.

176. *Id.* (quoting *Storey Oil Co. v. Am. States Ins. Co.*, 622 N.E.2d 232, 235 (Ind. Ct. App. 1993)).

177. *Id.* at 123.

178. IND. TRIAL R. 15(A).

requires.”¹⁷⁹

In *Kelley v. Vigo County School Corp.*,¹⁸⁰ a former principal brought an action against the county school corporation and school officials alleging defamation relating to allegations of an extra-marital affair, as well as other claims.¹⁸¹ After judgment on the pleadings and summary judgment were entered against the former principal, the former principal appealed. The court of appeals affirmed in part, but reversed and remanded the defamation claim.¹⁸² After remand, the former principal filed a motion for leave to file a third amended complaint, proposing additional claims of defamation, but the motion for leave was denied by the trial court.¹⁸³

The court of appeals affirmed the trial court’s ruling, finding that “it is not an abuse of discretion for the trial court to deny a motion to amend a pleading where such an amendment would be futile.”¹⁸⁴ First, applying the Indiana Supreme Court’s analysis in *McCarty v. Hospital Corp. of America*,¹⁸⁵ the court of appeals found that the proposed new allegations of defamatory conduct did not “relate back” to the date of the prior pleading.¹⁸⁶ Specifically, the court found that the new allegations did not arise “out of the conduct, transaction, or occurrence set forth . . . in the original pleading.”¹⁸⁷ Since the statute of limitations for a defamation claim in Indiana had passed, and the proposed amendment would not relate back to the date of the original pleading, the court found that the amendment would have been futile.¹⁸⁸

F. Collateral Estoppel

Collateral estoppel “bars subsequent litigation of a fact or issue which was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit.”¹⁸⁹ The former adjudication “will only be conclusive as to those issues which were actually litigated and determined therein.”¹⁹⁰

179. *Id.*

180. 806 N.E.2d 824 (Ind. Ct. App. 2004).

181. *Id.* at 826-27.

182. *Id.* at 833.

183. *Id.* at 829.

184. *Id.* at 830.

185. 580 N.E.2d 228 (Ind. 1991) (discussed in *Kelley*, 806 N.E.2d at 829-30).

186. *Kelley*, 806 N.E.2d at 829-30.

187. *Id.* at 829 & n.9 (quoting IND. TRIAL R. 15(C)).

188. *Id.* at 830 (noting that the statute of limitations for a defamation claim in Indiana is two years). The court in *Kelley* also found that the proposed amendments would have been futile on their merits, for a number of reasons. *Id.*

189. *Am. Family Mut. Ins. Co. v. Ginther*, 803 N.E.2d 224, 230 (Ind. Ct. App. 2004) (citing *Bartle v. Health Quest Realty VII*, 768 N.E.2d 912, 917 (Ind. Ct. App. 2002); *Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218, 1225 (Ind. Ct. App. 1999); *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 968 (Ind. 1998)).

190. *Id.* (citing *Wedel v. Am. Elec. Power Serv. Corp.*, 681 N.E.2d 1122, 1131 (Ind. Ct. App.

The primary consideration in the use of collateral estoppel is whether the party against whom the former adjudication is asserted had "a full and fair opportunity to litigate the issue and whether it would be otherwise unfair under the circumstances" to permit the use of issue preclusion in the subsequent action.¹⁹¹

In *American Family Mutual Insurance Co. v. Ginther*, an insurer obtained a dismissal with prejudice against its insured in a declaratory judgment action regarding insurance coverage.¹⁹² The claim involved injured motorists alleging personal injury claims against the insured.¹⁹³ The injured motorists later obtained a default judgment on their personal injury claims against the insured and filed a motion for proceeding supplemental against the insurer.¹⁹⁴ The insurer moved to dismiss the proceeding supplemental "on grounds that the coverage issue had previously been litigated in the declaratory judgment action."¹⁹⁵ Significantly, neither the insurer nor the insured added the injured motorists as parties to the declaratory judgment action.¹⁹⁶

The court in *Ginther* found that the injured motorists "were not parties in [the] declaratory action and therefore did not have a full and fair opportunity to litigate the coverage issue."¹⁹⁷ The court rejected the insurer's argument that the injured motorists "should have intervened in the declaratory judgment action[.]" quoting the following from Indiana's Declaratory Judgment Statute: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest that would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings [sic]."¹⁹⁸ Thus, the court confirmed that "it was the person seeking declaratory relief that should have joined the injured motorists, namely [the insured]."¹⁹⁹ Nevertheless, the court recognized that the statute "clearly provides that the injured motorists shall not be prejudiced because they were not parties to the declaratory judgment."²⁰⁰ The court concluded that because the injured motorists were not

1997)).

191. *Id.* (quoting *Sullivan v. Am. Cas. Co.*, 605 N.E.2d 134, 137 (Ind. 1992)).

192. *Id.* at 228.

193. *Id.*

194. *Id.*

195. *Id.* The motion to dismiss was treated as a motion for summary judgment, because the motion referred to matters outside the pleadings. *Id.* at 228 n.4. See also IND. TRIAL R. 12(B).

196. *Ginther*, 803 N.E.2d at 228.

197. *Id.* at 230.

198. *Id.* at 230-31 (quoting IND. CODE § 34-14-1-11).

199. *Id.* at 231.

200. *Id.* In reaching its conclusion, the court in *Ginther* discussed *Araiza v. Chrysler Insurance Co.*, 699 N.E.2d 1162 (Ind. Ct. App. 1998), and interpreted *Araiza* to hold that a "tortfeasor's inattention to or disregard of tortfeasor's insurer's declaratory action did not prevent the accident victim from establishing the availability of liability coverage to satisfy their judgment against the tortfeasor." *Ginther*, 803 N.E.2d at 231 (discussing *Araiza*, 699 N.E.2d 1162).

joined in the declaratory judgment action on coverage, they “did not have a full and fair opportunity to litigate the issue of [the insurer’s] obligation under their policy of insurance to [the insured].”²⁰¹

To the extent an insurer seeks a declaration regarding coverage against its insured, or vice versa, *Ginther*, along with the cases discussed therein, directs that both parties—not only the plaintiff in the action—should consider joining the injured party as a defendant in the lawsuit if the intent is to later claim that the injured party had a “full and fair opportunity to litigate” the action. In *Ginther*, the court did not clarify whether the injured party was provided notice of the declaratory judgment action. However, given the court’s reliance on the mandatory language of the Declaratory Judgment Statute, it is likely that the result would have been the same either way. Finally, the *Ginther* decision at least implies that joinder of the injured party is not required to enforce a judgment entered against the insured in the injured party’s absence.²⁰²

In *Infectious Disease of Indianapolis v. Toney*,²⁰³ the Indiana Court of Appeals held that collateral estoppel barred a plaintiff in a medical malpractice action from obtaining a second recovery from a subsequent health care provider for the same damages. However, the court allowed the suit to proceed against the second medical provider for the sole purpose of establishing liability.²⁰⁴ In *Toney*, the plaintiff settled her claim with the first alleged tortfeasor, and obtained a judgment for her excess damages from the Indiana Patient’s Compensation Fund.²⁰⁵

The court in *Toney* found that the plaintiff had a “full and fair opportunity to litigate her total damages arising from [the second health care provider’s] malpractice” when she settled her claim with the first alleged tortfeasor and obtained an excess judgment against the Patient’s Compensation Fund.²⁰⁶ Thus, the court ruled that the plaintiff was “collaterally estopped from seeking a second recovery for the same injuries from [the second alleged tortfeasor].”²⁰⁷ However, the court held that “there is not an identity of issues—and therefore collateral estoppel does not apply—when it comes to establishing whether the second provider committed medical malpractice.”²⁰⁸ The court stated that the plaintiff, “if she so chooses, should be permitted the opportunity to establish [her malpractice claim]” even though “there is no monetary incentive to pursuing a

201. *Ginther*, 803 N.E.2d at 231.

202. *But see* *Am. Standard Ins. Co. v. Rogers*, 123 F. Supp. 2d 461, 468-69 (S.D. Ind. 2000) (holding that the injured party is a necessary and indispensable party to an insurer’s coverage action).

203. 813 N.E.2d 1223 (Ind. Ct. App. 2004).

204. *Id.* at 1231.

205. *Id.* at 1226. Under Indiana law, “the original tortfeasor is responsible for all the damages flowing from his negligence, even if some of those damages are attributable to malpractice in the treatment of the original injury.” *Id.* at 1230.

206. *Id.* at 1231.

207. *Id.*

208. *Id.*

claim.”²⁰⁹ The implications of the court of appeals decision in *Toney* on damages as an essential element of a negligence claim are unclear.

G. Judicial Comity

In *Cloverleaf Enterprises, Inc. v. Centaur Rosecroft, LLC*,²¹⁰ the court addressed as a matter of first impression “whether an Indiana trial court has the discretion to enjoin non-citizen parties, over whom it has jurisdiction, from litigating a similar issue in a sister court—and, if so, the extent to which such discretion should be exercised.”²¹¹ In resolving the issue before it, the court looked to “the doctrine of comity, the policies underlying anti-suit injunctions, and the other jurisdictions that have addressed the issuance of such injunctions.”²¹²

The court in *Cloverleaf* outlined the law of judicial comity as follows:

It is axiomatic that state courts have the power to enjoin litigation in sister state courts under the doctrine of comity. Indeed, under principles of comity, Indiana courts may respect final decisions of sister courts as well as proceedings pending in those courts. However, comity is not a constitutional requirement to give full faith and credit to the law of a sister state, but it is a rule of convenience and courtesy. The doctrine of judicial comity represents a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Its primary value is to promote uniformity of decision by discouraging repeated litigation of the same question.²¹³

The court ruled that an Indiana court has the discretion to enjoin non-citizen parties over whom it has jurisdiction from litigating a similar issue in a sister court, under a “somewhat restrictive approach in granting such injunctions” followed by a majority of jurisdictions.²¹⁴ Under this restrictive approach, a court must first evaluate whether the requirements for a preliminary injunction have been met.²¹⁵ Once the threshold requirements are met, an anti-suit injunction is

209. *Id.* The court explained that “we must not totally discount an injured plaintiff’s desire to prove that she has been wronged by another to achieve a catharsis of sorts.” *Id.*

210. 815 N.E.2d 513 (Ind. Ct. App. 2004).

211. *Id.* at 518. The court discussed several appellate court decisions touching on the issue of “anti-suit injunctions,” but stated that none of the cases “squarely address the issue before [it], nor do they delineate the appropriate standard of appellate review for anti-suit injunctions.” *Id.* at 519 (discussing *Pitcairn v. Drummond*, 23 N.E.2d 21, 22 (Ind. 1939); *Abney v. Abney*, 374 N.E.2d 264 (Ind. App. 1978); *Hoehn v. Hoehn*, 716 N.E.2d 479, 481-82 (Ind. Ct. App. 1999)).

212. *Id.*

213. *Id.* (internal citations omitted).

214. *Id.* at 519-20.

215. *Id.* at 520-21. To obtain a preliminary injunction, the moving party has the burden of proving: (1) the movant’s remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) a reasonable likelihood of success at trial by establishing

appropriate only in circumstances “where the foreign litigation would: (1) threaten the issuing court’s in rem or quasi in rem jurisdiction; (2) frustrate a policy of the forum issuing the injunction; (3) prevent a multiplicity of suits; and (4) be vexatious or oppressive.”²¹⁶

The court in *Cloverleaf* found that the party seeking an anti-suit injunction failed to establish either the threshold preliminary injunction requirements or the enumerated factors specific to the anti-suit injunction analysis.²¹⁷ The court stated that “to prove irreparable harm,” the movant “must show that the [sister] court is biased or likely to misconstrue the governing law at issue.”²¹⁸ Further, the court found that the movant failed to prove the balance of harms, or that the public interest would be disserved.²¹⁹ Finally, the court found that the anti-suit injunction factors were not satisfied where the sister action did not threaten Indiana’s jurisdiction; it involved citizens, real estate, and law from the sister state; it did not infringe on Indiana’s jurisdiction or policies; and no showing was made that the sister action was “vexatious or oppressive.”²²⁰

H. Statute of Limitations—Fraudulent Concealment

“Fraudulent concealment is an equitable doctrine that operates to estop a defendant from asserting the statute of limitations as a bar to a claim whenever the defendant, by his own action, prevents the plaintiff from obtaining the knowledge necessary to pursue a claim.”²²¹ Further, Indiana’s Fraudulent Concealment Statute provides the following: “If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at anytime [sic] within the period of limitation after the discovery because of action.”²²² The doctrine of fraudulent concealment “is available to the plaintiff when the defendant ‘has either by deception or by a violation of a duty, concealed from the plaintiff material facts thereby preventing

a *prima facie* case; (3) the threatened injury outweighs the potential harm to the non-moving party if the injunction is granted; and (4) the public interest would not be disserved. *Id.* (citing *Robert’s Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 863 (Ind. Ct. App. 2002) (quoting *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002))).

216. *Id.* at 521. A court may also consider “whether separate adjudications could result in inconsistent rulings or a ‘race to judgment,’ and whether ‘adjudicating the issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses.’” *Id.* (quoting *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981)).

217. *Id.* at 521-22.

218. *Id.* at 521.

219. *Id.* at 521-22.

220. *Id.* at 522.

221. *Johnson v. Hoosier Enters. III, Inc.*, 815 N.E.2d 542, 549 (Ind. Ct. App. 2004) (quoting *Doe v. Shults-Lewis Child & Family Servs.*, 718 N.E.2d 738, 744 (Ind. 1999)).

222. *Id.* at 548-49 (quoting IND. CODE § 34-11-5-1).

the plaintiff from discovering a potential cause of action.”²²³

In *Johnson v. Hoosier Enterprises III, Inc.*, the personal representative of the estate of a former health care facility resident sued the entity he believed to be the owner and operator of the facility in a wrongful death action. The management company and true operator of the health facility failed to obtain a required license for the operation of the facility, or to disclose to the public that it operated the facility, as required by statute.²²⁴ The personal representative learned that the management company was the operator of the facility, and amended the wrongful death complaint to name the operator, after the applicable two-year statute of limitations had expired.²²⁵ The court in *Johnson* held that the operator “failed in its duty to disclose its identity to the public, thereby concealing its identity from anyone ‘entitled to bring’ an action.”²²⁶ The court’s ruling demonstrates that the doctrine of fraudulent concealment applies when “concealment or misrepresentation of the *party* against whom a cause of action has arisen occurs[,]” in addition to when the concealment involves only the existence of the cause of action.²²⁷

I. Class Action Certification

In *Wal-Mart Stores, Inc. v. Bailey*,²²⁸ the court of appeals demonstrated the importance of a properly defined class and clarified the proper standard for determining whether common issues predominate over individual issues. The plaintiff in *Bailey* sued her former employer, Wal-Mart Stores, claiming that she was “subject to a corporate policy . . . which caused her to work off the clock and be uncompensated for her time.”²²⁹ The trial court granted the plaintiff’s certification motion and defined the class as “[a]ll current and former hourly employees of Wal-Mart . . . in the State of Indiana during the period August 1, 1998 to present.”²³⁰

The court in *Bailey* instructed that “[a] properly defined class is necessary at the outset because a judgment in a class action has a res judicata effect on absent class members.”²³¹ Further, “[t]he class definition must be specific enough for the court to determine whether or not an individual is a class member.”²³² Since the class, as defined, included “members who never worked

223. *Id.* at 549 (quoting *Doe*, 718 N.E.2d at 744).

224. *Id.* at 549-50 (discussing licensing and disclosure requirements of IND. CODE § 16-28-2-1 to -10).

225. *Id.* at 545.

226. *Id.* at 550 (quoting IND. CODE § 34-11-5-1).

227. *Id.* at 549 (quoting *Stephens v. Irvin*, 730 N.E.2d 1271, 1278 (Ind. Ct. App. 2000)).

228. 808 N.E.2d 1198 (Ind. Ct. App. 2004).

229. *Id.* at 1199.

230. *Id.* at 1200.

231. *Id.* at 1201 (citing *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 981 (Ind. Ct. App. 1998)).

232. *Id.* (citing *Sterley*, 666 N.E.2d at 981).

off the clock,” the court found that it included “members who have no interest in the lawsuit” and it “should not have been certified.”²³³

The *Bailey* court also found that the trial court applied the wrong standard when it determined whether issues common to the class predominated over individual issues.²³⁴ Specifically, the trial court stated that a “[p]redominance of common questions is satisfied when ‘the claims of the individual plaintiffs are derived from a common nucleus of operative facts.’”²³⁵ This standard, according to the defendant, does not require that common claims necessarily predominate. Otherwise, the predominance test for class certification would be no different than the commonality test.²³⁶ The court of appeals agreed.²³⁷

The court explained that “while there is considerable overlap between the two, [Trial Rule] 23(A)(2) requires that common issues exist while [Trial Rule] 23(B)(3) requires that those issues predominate.”²³⁸ Therefore, the court continued, “while a common nucleus of operative facts *may* satisfy the predominance requirement, such is not necessarily so.”²³⁹

J. Discovery

In *Airgas Mid-America, Inc. v. Long*,²⁴⁰ an employer brought an action against its former employees and their new company for misappropriation of trade secrets and confidential information, and for breach of fiduciary duty.²⁴¹ The former employer served a subpoena duces tecum on the defendants’ accountant, seeking the accountant’s “entire file” concerning the defendants, and the accountant moved to quash the subpoena on the ground of accountant-client privilege.²⁴² The trial court granted the motion.²⁴³

The court of appeals held that the accountant’s “blanket privilege claim was insufficient to meet its burden of demonstrating that the information was privileged under the accountant-client privilege.”²⁴⁴ Specifically, the court stated that “[c]laims of privilege ‘must be made and sustained on a question-by-question or document-by-document basis.’”²⁴⁵ Because the accountant in *Long* “did not assert the privilege on a question-by-question or document-by-document

233. *Id.* at 1204.

234. *Id.* (citing IND. TRIAL R. 23(B)(3)).

235. *Id.*

236. *Id.* (citing IND. TRIAL R. 23(A)(2) (commonality test) & 23(B)(3) (predominance test)).

237. *Id.*

238. *Id.* at 1206.

239. *Id.* (emphasis in original).

240. 812 N.E.2d 842 (Ind. Ct. App. 2004).

241. *Id.* at 844-45.

242. *Id.* at 844.

243. *Id.*

244. *Id.* at 846.

245. *Id.* at 845 (citing *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996)).

basis[.]" the court reversed the trial court's order granting the motion to quash.²⁴⁶

K. Failure to Prosecute

In *Lee v. Pugh*,²⁴⁷ the court examined a trial court's discretion in granting a motion to dismiss for failure to prosecute, under Trial Rule 41(E).²⁴⁸ In practice, attorneys often advise their clients that a Rule 41(E) motion might be denied if the plaintiff appears for the hearing on the motion. In other words, in many instances, a Rule 41(E) motion is more likely to prompt a plaintiff to take action than it is to dispose of the case. Nevertheless, the court in *Lee* provided a reminder that Rule 41(E) dictates the consequences of a plaintiff's failure to pursue a case, and that the court of appeals will question the trial court's decision only if it finds an abuse of discretion.²⁴⁹

In *Lee*, the court found that several factors, including more than ninety days of inactivity and the plaintiffs' failure to respond to discovery,²⁵⁰ supported the trial court's decision to dismiss the case pursuant to Trial Rule 41(E).²⁵¹ The court also enumerated the factors to be balanced in determining whether a trial court has abused its discretion in dismissing a case for failure to prosecute:

- (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.²⁵²

The court noted that "a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay."²⁵³ The court affirmed the trial court's dismissal, as

246. *Id.* at 846. *See also* Howard v. Dravet, 813 N.E.2d 1217, 1221 (Ind. Ct. App. 2004) (stating that "[t]he claim of privilege must be made and sustained on a document-by-document basis" and holding that in camera review of privileged evaluation letter from insurer's file was insufficient to establish privilege of entire claims file) (citing Petersen v. U.S. Reduction Co., 547 N.E.2d 860, 862 (Ind. Ct. App. 1989)).

247. 811 N.E.2d 881 (Ind. Ct. App. 2004).

248. *Id.* at 884.

249. *Id.* at 884-85.

250. *Id.* at 885-86.

251. *Id.* at 887.

252. *Id.* at 885 (quoting Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003)).

253. *Id.* (quoting Belcaster, 785 N.E.2d at 1167).

well as its denial of the plaintiffs' motion to reinstate their complaint.²⁵⁴

L. Default Judgment

In *Comer-Marquardt v. A-1 Glassworks, LLC*,²⁵⁵ a former employer brought an action against its former employee and the employee's solely-owned business, on a respondeat superior theory, alleging that the employee converted funds from the employer.²⁵⁶ The employee answered, pro se, but the employee's business failed to separately answer the complaint.²⁵⁷ The employer moved for and was granted a default judgment against the employee's business.²⁵⁸

On appeal, the court held that "if the liability of a defaulting defendant is completely dependent upon the liability of a non-defaulting codefendant, a final judgment should not be entered against the defaulting defendant unless the codefendant has been found liable."²⁵⁹ In this case, because the business was potentially liable under only a theory of respondeat superior, the court found that a default could not be entered against the business unless judgment was first entered against the primary obligor, the former employee.²⁶⁰

The ruling in *Comer-Marquardt* has implications not only for cases involving respondeat superior, but also for any case in which a defendant's liability is contingent on that of a codefendant—e.g., indemnity, surety, or guaranty obligations in which the obligations are not joint and several.

In *Whitt v. Farmer's Mutual Relief Ass'n*,²⁶¹ the plaintiff filed a complaint to foreclose on a real estate contract. In response to the complaint, the defendant, the proposed purchaser of the property, filed a pro se letter with the trial court, denying the allegations in the complaint.²⁶² The plaintiff filed a motion for default judgment, which was granted by the trial court.²⁶³ In reliance on the default judgment, the plaintiff transferred title of the property to a third party.²⁶⁴ The defendant filed a motion to set aside the default judgment, pursuant to Trial Rules 55(C) and 60(B), nearly one year after the default judgment was entered, arguing that the letter filed with the court constituted an "answer" to the plaintiff's complaint.²⁶⁵

Initially, the court in *Whitt* clarified that even when a motion to set aside a

254. *Id.* at 888.

255. 806 N.E.2d 883 (Ind. Ct. App. 2004).

256. *Id.* at 885.

257. *Id.*

258. *Id.*

259. *Id.* at 888 (quoting *Rothman v. Hebebrand*, 720 So. 2d 595, 596 (Fla. Dist. Ct. App. 1998)).

260. *Id.*

261. 815 N.E.2d 537 (Ind. Ct. App. 2004).

262. *Id.* at 538.

263. *Id.* at 538-39.

264. *Id.* at 539.

265. *Id.*

default judgment must be filed within one year pursuant to Trial Rule 60(B), the motion must still be filed within a "reasonable" time.²⁶⁶ The court in *Whitt* found that the defendant's motion was not filed within a reasonable time, because title to the property had already been transferred and the motion was filed nearly one year after the judgment was entered.²⁶⁷ Further, as evidenced by the defendant's letters to the trial court, the defendant was aware of the complaint. Having offered no basis for his delay in moving to set aside the default judgment, the court held that the trial court did not abuse its discretion by denying the defendant's motion to set aside the default judgment.²⁶⁸

M. Motion to Dismiss Treated as Summary Judgment

When a motion to dismiss "is sustained for failure to state a claim under [Trial Rule] 12(B)(6), the pleading may be amended once as of right."²⁶⁹ However, on a 12(B)(6) motion to dismiss if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."²⁷⁰

In *Robbins v. Canterbury School, Inc.*, the mother of a student at a private school brought an action requesting copies of documents supporting the school's investigation regarding its decision to expel the student.²⁷¹ The school filed a motion to dismiss under Trial Rule 12(B)(6). In response to the motion, the mother submitted a number of exhibits, and at the hearing on the motion, the mother "failed to object to the trial court's consideration of matters outside the pleadings."²⁷² The trial court dismissed the mother's petition, with prejudice.²⁷³ The mother appealed, arguing "that the trial court improperly dismissed her petition with prejudice without affording her the opportunity to amend it."²⁷⁴ The court of appeals in *Robbins* found that the trial court properly treated the school's motion as a motion for summary judgment.²⁷⁵ The court held that there was "no

266. *Id.* at 540 (stating that "[t]here may be cases where a two week delay was unreasonable, and others where an eleven month delay was reasonable") (quoting *Henderson v. Am. Optical Co.*, 418 N.E.2d 549, 553-54 (Ind. Ct. App. 1981)).

267. *Id.* at 541.

268. *Id.* Because the court decided the case on other grounds, it did not address whether the pro se letter constituted an "answer" sufficient to avoid a default judgment. Notably, the trial court granted the default judgment despite the filing of the pro se letter, at least implying that the particular letter did not constitute an "answer" under the Trial Rules.

269. *Robbins v. Canterbury Sch., Inc.*, 811 N.E.2d 957, 959-60 (Ind. Ct. App. 2004) (citing *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001)).

270. *Id.* at 960 (citing *Benthall v. City of Evansville*, 674 N.E.2d 580, 583 (Ind. Ct. App. 1996); *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind. Ct. App. 1996)).

271. *Id.* at 959.

272. *Id.* at 960.

273. *Id.* at 959.

274. *Id.*

275. *Id.* at 960.

error in not affording [the mother] the opportunity to amend her complaint.”²⁷⁶

The court’s decision in *Robbins* does not address the trial court’s characterization of its order as a dismissal, with prejudice, rather than as an order granting summary judgment as directed by the Trial Rule. An accurate characterization by the trial court may have avoided the issue completely. Nevertheless, the *Robbins* decision serves as a caution to a plaintiff opposing a motion to dismiss. While the substance and merits of the motion may warrant the submission of materials outside the pleadings, the plaintiff must weigh the risk of a dispositive ruling, without the opportunity to amend the pleading.

N. Summary Judgment

1. *State Standard Compared to Federal Standard.*—In *Van Etten v. Fegasas*,²⁷⁷ the court compared the federal standard for summary judgment with the Indiana state standard.²⁷⁸ In *Van Etten*, an intoxicated restaurant patron filed an action against the restaurant and the restaurant’s manager, alleging negligence and assault.²⁷⁹ In his second summary judgment motion, the plaintiff cited a case from the Southern District of Indiana that stated that “[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”²⁸⁰

The court in *Van Etten* stated the summary judgment standard in state court as follows:

[S]ummary judgment is appropriate when no designated genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. . . . A party appealing the denial of summary judgment carries the burden of persuading this court that the trial court’s decision was erroneous. The movant must demonstrate the absence of any genuine issue of fact as to a determinative issue and only then is the non-movant required to come forward with contrary evidence. This court may not search the entire record but may only consider the evidence that has been specifically designated. All pleadings, affidavits, and testimony are construed liberally and in a light most favorable to the

276. *Id.* The court in *Robbins* proceeded to rule that the trial court did not err on the merits of the claim, which involved the interpretation of a statute allowing equal access to a child’s school records for custodial and noncustodial parents. *Id.* at 960-61 (discussing IND. CODE § 20-10.1-22.4-2).

277. 803 N.E.2d 689 (Ind. Ct. App. 2004).

278. *Id.* at 691-92.

279. *Id.* at 691. The plaintiff in *Van Etten* became intoxicated while celebrating his birthday at the restaurant. He apparently engaged in an altercation with other restaurant patrons and was ultimately escorted out of the restaurant. *Id.* at 690. As the manager of the restaurant escorted him out, he was allegedly struck in the leg with a large statue of a Native American. *Id.* The restaurant manager contended that the plaintiff slipped and fell on ice outside the restaurant. *Id.*

280. *Id.* at 691 (quoting *Sedwick v. Togo West*, 92 F. Supp. 2d 813, 815 (S.D. Ind. 2000)).

nonmoving party.²⁸¹

In contrast, the court in *Van Etten* encapsulated the federal standard as follows:

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. A mere scintilla of evidence does not suffice to defeat summary judgment. Not every factual dispute creates a barrier to summary judgment. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.²⁸²

Under the federal standard, “if it appears unlikely that the non-movant will win the case, summary judgment may be granted.”²⁸³ However, under the Indiana standard, “[i]t is entirely the burden of the movant to demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence.”²⁸⁴ Under the Indiana standard “there is no requirement that the non-movant produce sufficient contrary evidence to allow the possibility that he will win his case. He merely must show that there is *some* admissible evidence that creates a genuine issue of material fact to prevent the trial judge from granting summary judgment.”²⁸⁵ The court held that the plaintiff presented sufficient evidence to avoid summary judgment under the Indiana standard.²⁸⁶ In addition to his affidavit, the plaintiff submitted an ambulance report and the report of a police officer at the scene, both supporting his claim.²⁸⁷

2. *Strict Adherence to Thirty-day Response Deadline.*—In *Fort Wayne Lodge, LLC v. EBH Corp.*,²⁸⁸ the court affirmed the trial court’s sua sponte ruling that it would not consider material filed in opposition to a motion for summary judgment, where the material was filed after the thirty-day deadline dictated by Rule 56.²⁸⁹ The court explained that:

Trial Rule 56(C) requires that an adverse party designate evidence and material issues of fact in its “response,” which must be filed within 30 days after the motion is served. If the non-moving party does not respond to a properly supported motion by setting forth specific facts showing a genuine issue for trial, then [Trial Rule] 56(E) mandates that

281. *Id.* (quoting *Little Beverage Co. v. DePrez*, 777 N.E.2d 74, 77-78 (Ind. Ct. App. 2002)).

282. *Id.* (quoting *Sedwick*, 92 F. Supp. 2d at 816).

283. *Id.* at 692.

284. *Id.* (citing *Little Beverage Co.*, 777 N.E.2d at 77-78).

285. *Id.* (emphasis in original).

286. *Id.* at 692-93.

287. *Id.* at 692. Regarding the plaintiff’s affidavit, the court stated the rule that “[a] non-movant may not create issues of fact by pointing to affidavit testimony which contradicts the witness’s sworn testimony in a prior deposition.” *Id.* (quoting *Keesling v. Baker & Daniels*, 571 N.E.2d 562, 568 (Ind. Ct. App. 1991)).

288. 805 N.E.2d 876 (Ind. Ct. App. 2004).

289. *Id.* at 883.

summary judgment, if appropriate, be entered against him.²⁹⁰

Recognizing that Rule 56(I) allows the court, for cause shown, to “alter any time limit set forth in [Trial Rule 56,]” the court of appeals nevertheless concluded that the untimely response should not have been considered.²⁹¹

In *Desai v. Croy*,²⁹² the court of appeals clarified that a trial court lacks discretion to allow a party to file a response to a motion for summary judgment if the response is not filed within the thirty-day time limit established by Trial Rule 56(C).²⁹³ The court in *Desai* followed the rule established in *Seufert v. RWB Medical Income Properties I Ltd. Partnership*,²⁹⁴ that the remedies provided by Rules 56(F) and (I) are “not available to a nonmoving party who has failed to oppose or respond to the motion within the thirty-day limit established by [Trial Rule] 56(C).”²⁹⁵ Following *Seufert*, the court in *Desai* held that:

where a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response.²⁹⁶

In other words, according to the court in *Desai*, unless the nonmoving party has responded or sought an extension within thirty days from the date the moving party filed for summary judgment, the trial court lacks discretion to alter the time limits under Trial Rule 56(I).²⁹⁷

3. *Findings by Commissioner.*—In *Cummins v. McIntosh*,²⁹⁸ the court of appeals explained the role and obligations of the master commissioner when ruling on a summary judgment motion. In *Cummins*, a medical malpractice plaintiff filed suit against a physician, based on the physician’s treatment of the plaintiff’s broken femur.²⁹⁹ Based on the recommendation of the master commissioner, the trial court granted summary judgment in favor of the physician.³⁰⁰ The plaintiff appealed, arguing that the master commissioner failed to provide adequate findings to support the court’s judgment.

290. *Id.* at 883 n.1 (citing *Kissell v. Vanes*, 629 N.E.2d 878, 880 (Ind. Ct. App. 1994)).

291. *Id.* at 883. See also *Coleman v. Charles Court, LLC*, 797 N.E.2d 775 (Ind. Ct. App. 2003) (stating that affidavit is required to support motion for enlargement of thirty-day deadline, under Trial Rule 56(F)).

292. 805 N.E.2d 844 (Ind. Ct. App. 2004).

293. *Id.* at 850-51.

294. 649 N.E.2d 1070 (Ind. Ct. App. 1995).

295. *Desai*, 805 N.E.2d at 848.

296. *Id.* at 850.

297. *Id.*

298. 803 N.E.2d 1155 (Ind. Ct. App. 2004).

299. *Id.* at 1156.

300. *Id.* at 1159.

Pursuant to then sections 33-4-7-4 through 33-4-7-8 of the Indiana Code, “[a] master commissioner *shall report the findings in each of the matters before the master commissioner in writing* to the judge or judges of the division to which the master commissioner is assigned or as designed [sic] by rules of the court.”³⁰¹ Further, a “magistrate shall report findings in an evidentiary hearing, a trial, or a jury’s verdict to the court.”³⁰²

The court in *Cummins* recognized that “a commissioner acts as an instrumentality to inform and assist the court by conducting hearings and reporting facts or conclusions to the trial court; however, only the court has inherent authority to make binding orders or judgments.”³⁰³ In *Cummins*, the commissioner found only that the summary judgment motion should be granted, without “informing the trial court judge of the facts upon which her decision was based.”³⁰⁴ The court of appeals held that the commissioner’s finding “was insufficient to inform or assist the trial court judge in determining whether there was a genuine issue as to any material fact” and, therefore, the case was remanded for more specific findings.³⁰⁵

4. *Order Denying Summary Judgment Is Interlocutory.*—In *Cardiology Associates of Northwest Indiana, P.C. v. Collins*,³⁰⁶ the court clarified that regardless of the trial court’s characterization of an order denying summary judgment as a final, appealable order, the order is interlocutory and the proper procedures for bringing an interlocutory appeal must be followed.³⁰⁷ The court in *Collins* explained that “to be a final judgment . . . , a judgment must possess the requisite degree of finality and must dispose of at least a single substantive claim.”³⁰⁸ According to the court, “an order denying a motion for summary judgment is not a final appealable order, as no rights have been thereby foreclosed.”³⁰⁹

The denial of a summary judgment motion “merely places the parties’ rights in abeyance pending ultimate determination by the trier of fact.”³¹⁰ Thus, the court in *Collins* ruled that “a party seeking review of a denial of a motion for

301. *Id.* (emphasis in original) (quoting IND. CODE § 33-4-7-8(a) (repealed by Act of Mar. 19, 2004, § 164, 2004 Ind. Acts 98)). The text of former Indiana Code section 33-4-7-8(a) can be found at Indiana Code section 33-33-49-16(e).

302. *Id.* (quoting IND. CODE § 33-4-7-4(14) (repealed by Act of Mar. 19, 2004, § 164, 2004 Ind. Acts 98)). The text of former Indiana Code section 33-4-7-4(14) can be found at Indiana Code sections 33-33-49-16 and 33-23-5-9(a).

303. *Id.* at 1160 (quoting *Creedon v. Asher Truck & Trailer, Inc.*, 535 N.E.2d 148, 149 (Ind. Ct. App. 1989)).

304. *Id.*

305. *Id.*

306. 804 N.E.2d 151 (Ind. Ct. App. 2004).

307. *Id.* at 154-55.

308. *Id.* at 154 (citing *Legg v. O’Connor*, 557 N.E.2d 675, 676 (Ind. Ct. App. 1990)).

309. *Id.* at 154-55 (citing *Keith v. Mendus*, 661 N.E.2d 26, 35 (Ind. Ct. App. 1996)).

310. *Id.* at 155.

summary judgment must do so by way of interlocutory appeal.”³¹¹

O. Final Pre-Trial Order

In *Rust-Oleum Corp. v. Fitz*,³¹² the court addressed the binding nature of a final pre-trial order. In *Rust-Oleum*, a consumer injured while using a can of spray paint brought an action against the marketer of the product, alleging products liability and negligence.³¹³ The marketer filed a third-party complaint against the manufacturer, seeking indemnification.³¹⁴

In the pre-trial order, entered approximately one week before trial commenced, the marketer contended that “the can was not defectively manufactured, was not the subject of a design defect, and was filled and tested within D.O.T. specifications.”³¹⁵ The pre-trial order also stated that the marketer “added [the manufacturer] as a party to this lawsuit to assist in defending against the claims made by the plaintiffs.”³¹⁶ At trial, the consumer plaintiff filed a motion to remove the manufacturer from the case and the trial court granted the motion.³¹⁷

In affirming the trial court’s order removing the manufacturer from the case, the court of appeals recognized the “binding effect of a pre-trial order,” but noted that a pre-trial order need not “be rigidly and pointlessly adhered to at trial.”³¹⁸ Nevertheless, the court found that the pre-trial order did not include a claim for indemnification against the manufacturer, which was the claim that allowed the manufacturer to be “properly impleaded in the first place.”³¹⁹ With the third-party claim gone, the court held that the manufacturer was no longer a proper party to the litigation.³²⁰ Significant to the court’s ruling was its finding that “[a]lthough the third-party complaint may have properly impleaded [the manufacturer], a pre-trial order delineating the issues of the case supplants the allegations raised in the pleadings and controls all subsequent proceedings in the case.”³²¹ According to the court, the “issues become those contained in the pre-trial order.”³²²

311. *Id.* (citing IND. APP. R. 14).

312. 801 N.E.2d 754 (Ind. Ct. App. 2004).

313. *Id.* at 755.

314. *Id.*

315. *Id.* at 756.

316. *Id.*

317. *Id.*

318. *Id.* at 758 (citing *Whisman v. Fawcett*, 470 N.E.2d 73, 76 (Ind. 1984)).

319. *Id.* at 759.

320. *Id.*

321. *Id.* at 758 (citing *Marotta v. Iroquois Realty Co.*, 412 N.E.2d 797, 799 (Ind. Ct. App. 1980)).

322. *Id.*

P. Jury Verdicts

A “compromise verdict is one in which a jury, ‘although determining that the defendant is liable, nonetheless awards either zero damages or damages which are inconsistent with the facts introduced at trial.’”³²³ In *Cortner v. Louk*, a motorcyclist was injured when his motorcycle collided with another vehicle.³²⁴ The motorcyclist and his wife brought a personal injury action against the driver of the vehicle and a jury trial was held.³²⁵ During deliberations, the jury sent several questions to the trial court, asking whether they could find that the defendant was at fault, but award nominal or no damages.³²⁶ The jury eventually returned a verdict in favor of the defendant.³²⁷ The plaintiffs moved for mistrial and the trial court granted the motion, indicating that the jury’s decision was a compromise verdict.³²⁸

The court in *Louk* reversed the trial court, holding that “it was legally impermissible, and thus an abuse of discretion, to rely upon notes sent by the jury during its deliberations to cast doubt upon the validity of its final verdict.”³²⁹ The court explained that “[i]t has long been established in Indiana that a jury’s verdict may not be impeached by the testimony of the jurors who returned it.”³³⁰ Further, the court stated that “using the jury’s deliberation questions and statements to vacate a facially valid verdict that conforms with the evidence arguably erodes ‘the inviolate right to a jury trial provided by section 20 of the Indiana Bill of Rights.’”³³¹ According to the court, it is of “no moment . . . that the questions/statements were made by the jury voluntarily and while it was still

323. *Cortner v. Louk*, 797 N.E.2d 326, 329 (Ind. Ct. App. 2003) (quoting *Archer v. Grotzinger*, 680 N.E.2d 886, 888 (Ind. Ct. App. 1997)).

324. *Id.* at 328.

325. *Id.*

326. *Id.* The two relevant notes read, “If we find the defendant more at fault than the plaintiff and we find the damages to be one penny will you can you [sic] throw out the award/verdict?” and “If we assign fault to the defendant and assign damages of zero \$0.00 dollars by rule of law can the award be changed, modified or overridden by anyone.” *Id.* The trial court responded to each note with a statement that “You have all of the law and all of the facts you are permitted to consider in arriving at your verdict.” *Id.*

327. *Id.*

328. *Id.* After the order granting a mistrial, the trial court entered an amended order, indicating that the court learned during a post-trial conversation that the jurors “felt the defendant was more responsible,” but that “they believed the plaintiff’s expenses had been covered by his insurance.” *Id.* No evidence that the plaintiff’s damages had been covered by insurance had been introduced at trial. *Id.*

329. *Id.* at 330.

330. *Id.* (citing *Ward v. St. Mary Med. Ctr. of Gary*, 658 N.E.2d 893, 894 (Ind. 1995)). According to the court in *Louk*, the most frequently cited policy reasons for this rule are that “(1) there would be no reasonable end to litigation, (2) jurors would be harassed by both sides of litigation, and (3) an unsettled state of affairs would result.” *Id.*

331. *Id.* (quoting *Ward*, 658 N.E.2d at 895).

impaneled.”³³²

The plaintiffs in *Louk* also argued on appeal that upon receiving the questions from the jury, the trial court “was required to ‘poll the jury regarding any improper influence.’”³³³ The court disagreed, finding that “in this case the jury’s potential confusion over a point of law did not require a polling of the jury because there is no claim or evidence here that an ‘adventitious, potentially influential event’ prompted its questions.”³³⁴ The court concluded that the “jury’s facially valid verdict could not be impeached by questions asked before it was entered or statements made thereafter by the jurors.”³³⁵

Q. Arbitration

A party seeking to compel arbitration “must satisfy a two-pronged burden of proof.”³³⁶ First, the party

must demonstrate the existence of an enforceable agreement to arbitrate the dispute. Second, the party must prove that the disputed matter is the type of claim that the parties agreed to arbitrate. Once the court is satisfied that the parties contracted to submit their disputed to arbitration, the court is required by statute to compel arbitration.³³⁷

In making the determination, the court applies “ordinary contract principles governed by state law.”³³⁸

1. *Privity of Contract and Third-Party Beneficiary Theory.*—In *Daimler Chrysler Corp. v. Franklin*, a car purchaser brought an action against the manufacturer of the vehicle for breach of warranties, “revocation of acceptance, and a violation of the Indiana Motor Vehicle Protection Act.”³³⁹ The

332. *Id.*

333. *Id.* at 331.

334. *Id.* at 331-32. The court noted that the plaintiffs cited no case, and the court’s research revealed none, that “requires a jury to be polled whenever it asks a question that reflects a potential misunderstanding of or confusion over the law.” *Id.* at 331. The court analogized *Anderson v. Taylor*, 289 N.E.2d 781 (Ind. Ct. App. 1972), which rejected a plaintiff’s argument that a jury, after being denied a request for access to a dictionary during its deliberations, should have been called into open court and questioned as to why they wanted a dictionary, and then given “further clarifying instructions to correct any misunderstandings they might have had.” *Id.* (citing *Taylor*, 289 N.E.2d at 786-87).

335. *Id.* at 333.

336. *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 284 (Ind. Ct. App. 2004) (citing *Mislenkov v. Accurate Metal Detinning, Inc.*, 743 N.E.2d 286, 289 (Ind. Ct. App. 2001)).

337. *Id.* (citations omitted). See also IND. CODE § 34-57-2-3(a) (2004) (“On application by a party showing an agreement described in section 1 of this chapter, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration.”).

338. *Daimler Chrysler*, 814 N.E.2d at 284-85 (citing *Showboat Marina Casino P’ship v. Tonn & Blank Constr.*, 790 N.E.2d 595, 598 (Ind. Ct. App. 2003); *Mislenkov*, 743 N.E.2d 289).

339. *Id.* at 284. See also Indiana Motor Vehicle Protection Act, IND. CODE §§ 24-5-13-1 to

manufacturer moved to dismiss the complaint and compel arbitration, relying on the arbitration provision contained in the purchaser's retail installment contract with the dealer.³⁴⁰ The trial court denied the motion, the case proceeded to jury trial and the jury decided in the purchaser's favor.³⁴¹ The manufacturer appealed.³⁴²

The court in *Daimler Chrysler* found that the manufacturer was not in privity of contract with the purchaser, and it was not an intended third-party beneficiary of the contract between the dealer and the purchaser.³⁴³ Therefore, the court held that the manufacturer could not enforce the arbitration provision against the purchaser.³⁴⁴

On the issue of privity, the court recognized that "only those who are parties to a contract or those in privity with a party have the right to enforce the contract."³⁴⁵ Privity has been defined as "mutual or successive relationships to the same right of property, or an identification of interest of one person with another as to represent the same legal right."³⁴⁶ Noting that in Indiana, "privity between the buyer and seller is generally required to maintain a cause of action on an implied warranty of merchantability claim[.]" the court proceeded to find that the dealer in this case was not an "agent of the manufacturer" and the manufacturer did not "participate[] significantly in the sale of the [vehicle]."³⁴⁷ Because "the mere existence of a manufacturer-dealer relationship is insufficient to make the dealer an agent of the manufacturer for purposes of the privity requirement[.]" the manufacturer was not in privity with the purchaser and could not enforce the arbitration provision on that basis.³⁴⁸

Finally, the court in *Daimler Chrysler* found that the manufacturer was "not an intended third-party beneficiary of the contract."³⁴⁹ The court explained that to "enforce a contract under [a third-party beneficiary] theory, the claimant must show 1) a clear intent by the parties to the contract to benefit the third party, 2) a duty imposed on one of the contracting parties in favor of the third party, and 3) performance of the contract."³⁵⁰ The court stated that "the body of the contract and the arbitration agreement between [the dealer] and [the purchaser] does not

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340. *Id.* at 283-84.

341. *Id.* at 284.

342. *Id.*

343. *Id.* at 285-86.

344. *Id.* at 286.

345. *Id.* at 285.

346. *Id.* (quoting *Riehle v. Moore*, 601 N.E.2d 365, 371 (Ind. Ct. App. 1992)).

347. *Id.*

348. *Id.* at 285-86 (quoting *Hyundai Motor Am., Inc. v. Goodin*, 804 N.E.2d 775, 787 (Ind. Ct. App. 2004)).

349. *Id.* at 286.

350. *Id.* (citing *Angell Enters., Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362, 365 (Ind. Ct. App. 1994)).

reference [the manufacturer] and does not show a clear intent to benefit it.”³⁵¹ Thus, according to the court, the manufacturer “could not have been an intended third-party beneficiary of the contract, and it may not rely on the arbitration provision.”³⁵² The court affirmed the trial court’s denial of the manufacturer’s motion to dismiss and compel arbitration.³⁵³

2. *Unconscionable Contract Containing Arbitration Provision.*—In *Sanford v. Castleton Health Care Center, LLC*,³⁵⁴ the court determined as a matter of first impression in Indiana that “an admission agreement between a nursing home facility and a prospective admittee may contain an arbitration clause.”³⁵⁵ In *Sanford*, the personal representative of a patient’s estate brought a wrongful death and survival action against the nursing home.³⁵⁶ The nursing home moved to compel arbitration, pursuant to a mandatory arbitration provision contained in the admission agreement.³⁵⁷ The trial court entered an order compelling mediation and, if necessary, arbitration.³⁵⁸ The estate appealed, arguing, *inter alia*, that the admission contract is “an unconscionable adhesion contract.”³⁵⁹

According to the court in *Sanford*, an “adhesion contract—i.e., ‘a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it’—is not per se unconscionable.”³⁶⁰ Rather, the court stated, “a contract is unconscionable if a great disparity in bargaining power exists between the parties, such that the weaker party is made to sign a contract unwillingly or without being aware of its terms.”³⁶¹ To be unconscionable, “[t]he contract must be ‘such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept.’”³⁶²

The court in *Sanford* found that the estate failed to show that the contract containing the arbitration clause was signed “unwillingly and without being

351. *Id.*

352. *Id.*

353. *Id.*

354. 813 N.E.2d 411 (Ind. Ct. App. 2004).

355. *Id.* at 417.

356. *Id.* at 415-16.

357. *Id.*

358. *Id.* at 416.

359. *Id.* at 417.

360. *Id.* (quoting *Pigman v. Ameritech Pub., Inc.*, 641 N.E.2d 1026, 1035 (Ind. Ct. App. 1994), *overruled on other grounds*, *Trimble v. Ameritech Pub., Inc.*, 700 N.E.2d 1128 (Ind. 1998)).

361. *Id.* (citing *White River Conservancy Dist. v. Commonwealth Eng’rs, Inc.*, 575 N.E.2d 1011, 1017 (Ind. Ct. App. 1991)).

362. *Id.* (quoting *Progressive Constr. & Eng’g Co. v. Ind. & Mich. Elec. Co.*, 533 N.E.2d 1279, 1286 (Ind. Ct. App. 1989)). In other words, “[a] contract is not unenforceable merely because one party enjoys advantages over another.” *Id.* (citing *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980)).

legally aware of its terms.”³⁶³ In affirming the trial court’s decision to compel arbitration, the court in *Sanford* found that the arbitration provision was not buried or hidden in the contract, and that it was immediately followed by a signature line, which bore the personal representative’s signature.³⁶⁴ Further, the court stated that there is no requirement that an arbitration provision “describe in detail the process of arbitration.”³⁶⁵ Finally, the court noted that the parties were not precluded from asking questions regarding the process of arbitration or from reading the entire contract, including the arbitration provision.³⁶⁶

R. Attorney Fees

1. *Offer of Settlement*.—In *Shepherd v. Carlin*,³⁶⁷ following the entry of judgment on a jury verdict for an amount less than the defendant’s previous offer of settlement, the defendant filed a motion for an award of attorney fees under Indiana’s offer-of-settlement statute.³⁶⁸ The trial court entered an order granting the motion for attorney fees, awarding \$1.00 in attorney fees, costs and expenses.³⁶⁹ The court in *Carlin* reversed the trial court’s order and held that under the offer-of-settlement statute, the trial court “is required to award the attorney’s fees, costs, and expenses actually incurred by the offeror. Put another way, the trial court does not have discretion to enter a nominal award.”³⁷⁰

2. *Frivolous Litigation*.—In *Inlow v. Henderson, Daily, Withrow & DeVoe* (“*Inlow II*”),³⁷¹ the heirs of an estate brought an action against various insurers for negligence and breach of contract, and against the law firm representing the personal representative of the estate, as well as its individual partners, alleging negligence, “intermeddling,” and legal malpractice.³⁷² The defendants moved to dismiss the heirs’ complaint on various grounds and the trial court granted the motion. The heirs appealed.³⁷³

In May 2002, the insurers filed motions for attorney fees with the trial

363. *Id.* at 418.

364. *Id.*

365. *Id.*

366. *Id.* The court in *Sanford* also found that the arbitration clause did not violate the Federal Arbitration Act, it did not unconstitutionally deprive the parties of their right to a jury trial, and regardless of whether the personal representative was a party to or in privity with a party to the contract, the disputes at issue did “arise out of or relate to” the contract. Therefore, the claims were governed by the arbitration clause. *Id.* at 418-22.

367. 813 N.E.2d 1200 (Ind. Ct. App. 2004).

368. *Id.* at 1201-02. See also IND. CODE § 34-50-1-6 (2004).

369. *Carlin*, 813 N.E.2d at 1202.

370. *Id.* at 1204.

371. 804 N.E.2d 833 (Ind. Ct. App. 2004) (“*Inlow II*”).

372. *Id.* at 836-37. The court of appeals ultimately affirmed the trial court’s dismissal of the heirs’ complaint. See *Inlow v. Henderson, Daily, Withrow & DeVoe*, 787 N.E.2d 385 (Ind. Ct. App. 2003) (“*Inlow I*”).

373. *Inlow II*, 804 N.E.2d at 837.

court.³⁷⁴ In June 2002, the trial court clerk filed a notice of completion of record for appeal, regarding the heirs' appeal of the trial court's dismissal of their complaint.³⁷⁵ In July 2002, the trial court denied the motions for attorney's fees, on the ground that it lacked jurisdiction to consider the motions under Indiana Appellate Rule 8, "which provides that [the Indiana Court of Appeals] acquires jurisdiction when the trial court clerk issues the notice of completion of the record."³⁷⁶ The insurers filed motions to correct error, alleging that the trial court retained jurisdiction to award attorney fees, and the trial court granted those motions, ultimately awarding the insurers their attorney fees.³⁷⁷ The heirs appealed.³⁷⁸

The court in *Inlow II* affirmed the trial court's award of attorney fees.³⁷⁹ The court explained that a claim is frivolous

if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law.³⁸⁰

Further, a claim is "unreasonable" if, based upon the "totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation."³⁸¹ Finally, a claim is "groundless" if "no facts exist which support the claim relied upon and supported by the losing party."³⁸²

The court in *Inlow II* found that the heirs failed to show that they sustained any damages as a result of the insurers' alleged breaches of contract.³⁸³ Further, the court in *Inlow II* recognized its determination in *Inlow I* that the heirs "brought this action in the wrong forum, and [stated that] the trial court could

374. *Id.*

375. *Id.*

376. *Id.* (citing IND. APP. R. 8).

377. *Id.*

378. *Id.* at 838.

379. *Id.* at 841-42. The court in *Inlow II* first addressed the heirs' argument that the trial court "did not have jurisdiction to award attorney fees, since the court of appeals acquired jurisdiction before those awards were granted." *Id.* at 838. The court found that the trial court's "awards were premature under the circumstances." *Id.* However, the court recognized that the court in *Inlow I* affirmed the decision to dismiss the complaint. *Id.* Therefore, the court in *Inlow II* stated that "the principles of judicial economy dictate that [it] address the merits of this appeal." *Id.*

380. *Id.* at 839 (citing *Commercial Coin Laundry Sys. v. Enneking*, 766 N.E.2d 433, 441 (Ind. Ct. App. 2002)).

381. *Id.*

382. *Id.*

383. *Id.* at 841-42 (citing *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993), for the proposition that damages are an essential element of a breach of contract claim).

have awarded attorney's fees on that basis alone."³⁸⁴ The court in *Inlow II* also concluded that an award of appellate attorney fees was appropriate and remanded the case to the trial court for a hearing to determine appellate fees.³⁸⁵

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

Just before the end of the survey period—in September 2004—the Supreme Court of Indiana ordered various amendments to the Indiana Rules of Trial Procedure, effective January 1, 2005.³⁸⁶

A. Documents or Information Excluded from Public Access

A significant amendment, in terms of its immediate practical impact, is found in Trial Rule 5(G), which now provides that documents excluded from public access pursuant to Indiana Administrative Rule 9(G)(1)³⁸⁷ must be filed

384. *Id.* at 842 (citing *Inlow I*, 787 N.E.2d at 390-91). See also *St. Mary Med. Ctr. v. Baker*, 611 N.E.2d 135, 138 (Ind. Ct. App. 1993) (holding that failure to bring action in proper forum rendered action frivolous and justified attorney fee award) (cited in *Inlow II*, 804 N.E.2d at 842).

385. *Inlow II*, 804 N.E.2d at 842.

386. Amendments to the Indiana Trial Rules *effective during* the survey period were minimal. See IND. TRIAL R. 5(C) (required certificate of service at end of filed document), 34(C) (formatting amendments), 43(A), (B)-(D) (simplification of subparagraph relating to form and admissibility of evidence, and deleting subparagraphs relating to scope of cross-examination and record of excluded evidence), 44 (proof of official records governed by Indiana Rules of Evidence), 79 (special judge selection, place of hearing). These amendments were ordered by the Indiana Supreme Court in July 2003, effective January 1, 2004.

387. Indiana Administrative Rule 9(G)(1) excludes from public access the following documents and information:

1. Information excluded from public access pursuant to federal law;
2. Information excluded from public access pursuant to Indiana statute or other court rule, including but not limited to certain medical, mental health or tax records, adoption records, paternity records, certain arrest warrants, indictments, informations and other records relating to juvenile or criminal proceedings, and mediation, mini-trial or summary jury trial proceedings;
3. Information excluded from public access pursuant to specific court order;
4. Social Security Numbers;
5. Certain personal, identifying information (excluding names) of witnesses or victims in criminal or other specific proceedings, or information identifying the place of residence of judicial officers, clerks or other employees of courts and clerks of court;
6. Account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);
7. All orders of expungement entered in criminal or juvenile proceedings;
8. All personal notes and e-mail, and deliberative material, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDA's) or organizers and personal calendars.

on light green paper, and marked “Not for Public Access.”³⁸⁸ When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), the information must be omitted or redacted from the filed document.³⁸⁹ The excluded or redacted information must be included in a separate accompanying document – again, on light green paper and “conspicuously marked ‘Not for Public Access.’”³⁹⁰ The separate document must also identify the caption and number of the case, as well as the “document and location within the document to which the redacted material pertains.”³⁹¹

Rule 5(G) also applies to information contained in an appearance form filed pursuant to Indiana Trial Rule 3.1,³⁹² as well as to judgments or orders issued by a court.³⁹³ Further, Rule 5(G) has been incorporated by reference into the Indiana Rules for Small Claims and the Indiana Rules of Procedure for Original Actions. Both sets of procedural rules now include provisions dictating that “[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).”³⁹⁴

B. Summary Judgment

Indiana Trial Rule 56(I) was amended, effective January 1, 2005, to provide that “[f]or cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit.” The prior version of the Rule did not expressly require a motion “within the applicable time limit.” The amendment appears consistent with the Indiana Court of Appeals’ rulings in *Fort Wayne Lodge, LLC v. EBH Corp.*,³⁹⁵ and *Desai v. Croy*,³⁹⁶ which found that a trial court properly refused—and, in fact, lacked discretion—to consider a response or a motion for an extension of time to respond to a summary judgment

See IND. ADMIN. R. 9(G)(1). On or about February 4, 2005, the Indiana courts website added a helpful “Frequently Asked Questions” document, answering various common questions relating to confidentiality under Administrative Rule 9. See Ind. Supreme Court, Div. of State Court Admin., *Frequently Asked Questions About Administrative Rule 9* (Feb. 2004), available at <http://www.in.gov/judiciary/admin/accesshandbook-faq.pdf>.

388. IND. TRIAL R. 5(G)(1).

389. IND. TRIAL R. 5(G)(2).

390. *Id.*

391. *Id.* Rule 5(G) does not apply to records sealed by the court pursuant to Indiana Code section 5-14-3-5.5 “or otherwise,” nor does it apply to “records to which public access is prohibited pursuant to Administrative Rule 9(H).” IND. TRIAL R. 5(G)(4).

392. IND. TRIAL R. 3.1(D).

393. IND. TRIAL R. 58(C) (directing that “[e]very court that issues a judgment or order containing documents or information excluded from public access pursuant to Administrative Rule 9(G)(1) shall comply with the provisions of Trial Rule 5(G)”).

394. IND. SMALL CLAIMS R. 2(E) (commencement of action); IND. ORIGINAL ACTION R. 3(J) (application papers). Both Rules became effective January 1, 2005.

395. 805 N.E.2d 876 (Ind. Ct. App. 2004).

396. 805 N.E.2d 944 (Ind. Ct. App. 2004).

motion unless the response or motion for an extension is filed within the thirty-day time limit.³⁹⁷

C. Selection of Special Judge

Trial Rule 79, governing the appointment and selection of a special judge, was amended, effective January 1, 2005, to specify the deadlines for each party to strike from the panel of judges.³⁹⁸ Specifically, the moving party must strike from the panel within “seven (7) days from the day the clerk mails the panel to the parties.”³⁹⁹ The nonmoving party (or the clerk of the court in an ex parte proceeding) must make the final strike within “seven (7) days from the date of the first strike.”⁴⁰⁰ If the *nonmoving party* fails to strike within seven (7) days after the moving party strikes, “the moving party shall have seven (7) days from that time to make the final strike.”⁴⁰¹ If the *moving party* fails to strike within the time period proscribed by the Rule, “the judge who submitted the panel shall resume jurisdiction of the case.”⁴⁰²

D. Adoption and Amendment of Local Rules

Prior to January 1, 2005, Trial Rule 81 passively provided that “[e]ach local court may from time to time make and amend rules governing its practice not inconsistent with these rules.” In its September 2004 Order, effective January 1, 2005, the Indiana Supreme Court amended Rule 81, “strongly encouraging” the courts to adopt local rules “not inconsistent with—and not duplicative of—these Rules of Trial Procedure or other Rules of the Indiana Supreme Court.”⁴⁰³ Further, amended Rule 81 provides that the courts will be “required” to adopt a set of local rules “for use in all courts of record in a county” after January 1, 2007.⁴⁰⁴ The amended Rule provides a detailed procedure for the proposal, adoption and amendment of local rules, as well as recommending the periodic review and amendment of local rules to account for “changes in statutes, case law, or [the] Rules of Trial Procedure or other Rules of the Indiana Supreme Court.”⁴⁰⁵

397. See *supra* Part II.N.2 (discussing *Fort Wayne Lodge* and *Desai*).

398. IND. TRIAL R. 79(F).

399. IND. TRIAL R. 79(F)(2).

400. *Id.* The prior version of Rule 79 provided that “[t]he parties shall have not less than seven (7) days nor more than fourteen (14) days from the time the clerk mails the panel to the parties to strike as the court may allow.”

401. IND. TRIAL R. 79(F)(3).

402. IND. TRIAL R. 79(F)(4).

403. IND. TRIAL R. 81(A).

404. *Id.*

405. IND. TRIAL R. 81(B)-(J).

INDIANA CONSTITUTIONAL DEVELOPMENTS

JON LARAMORE*

In the most recent year, Indiana's appellate courts continued to interpret the structural provisions of the Indiana Constitution, addressing the gubernatorial veto, education, home rule, and other topics.¹ The Indiana Court of Appeals was especially active in the most recent year addressing provisions of the constitution having to do with individual rights, including the right to privacy and the rights of criminal defendants.² The Indiana Supreme Court had fewer opportunities to address individual rights claims under the Indiana Constitution than it had in some other recent years.

The court of appeals applied the supreme court's recent decisions relating to double jeopardy and search and seizure in several cases, coming to results different than those mandated by the Federal Constitution in some instances.³ In applying the equal privileges and immunities clause in several cases, the court of appeals avoided the conflicting interpretations of the applicable test that have marked decisions in previous years.⁴

Also in the most recent year, Hoosier voters enacted three amendments to the Indiana Constitution, and all three branches of government cooperated to apply the constitutional framework for gubernatorial succession upon the death of Governor Frank O'Bannon.⁵

I. THE STRUCTURAL CONSTITUTION

A. Article V, Section 14

The holdings in *D & M Healthcare, Inc. v. Kernan*,⁶ are important in preserving the balance between the three branches of state government.⁷ This case is even more useful, however, in exposing the manner in which the Indiana Supreme Court analyzes constitutional questions, especially those involving separation of powers principles.

The nursing home companies that initiated this litigation raised the question whether a governor's veto was invalidated because it was returned to the legislature "too early" under the standard created by the constitution.⁸ The bill

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1. Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929-30 (2004) (setting forth the distinction between the structural constitution (generally articles III through XV) and the rights constitution (generally articles I, II and XVI)). See *infra* Part I.

2. See *infra* Part II.

3. See *infra* Part II.F-G.

4. See Laramore, *supra* note 1, at 961-62; *infra* Part II.B.

5. See *infra* Parts III, IV.

6. 800 N.E.2d 898 (Ind. 2003).

7. The author of this Article was one of the counsel in this case for Governor Joseph Kernan, an appellee.

8. *D&M Healthcare*, 800 N.E.2d at 898.

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in question would have increased Medicaid reimbursement of the nursing homes, enlarging their revenues.⁹

The General Assembly passed the bill on April 29, 2001, the last day of the legislative session. The Clerk of the House of Representatives presented the bill to Governor Frank O'Bannon five days later, on May 4.¹⁰ On May 11, seven days after being presented with the bill, Governor O'Bannon vetoed it.¹¹ The governor delivered the vetoed bill back to the House of Representatives the same day he vetoed it.¹² The House next met on November 20, 2001.¹³

The nursing homes argued that these actions violated the constitutional provisions regarding vetoes and rendered Governor O'Bannon's veto ineffective, so that the bill became law.¹⁴ Article V, section 14 of the Indiana Constitution states:

- (a) Every bill which shall have passed the General Assembly shall be presented to the Governor. The Governor shall have seven days after the day of presentment to act upon such bill as follows:

...

- (2) He may veto it:

...

- (D) In the event of a veto after final adjournment of a session of the General Assembly, such bill shall be returned by the Governor to the House in which it originated on the first day that the General Assembly is in session after such adjournment If such bill is not so returned, it shall be a law notwithstanding such veto.¹⁵

In a nutshell, the nursing homes' argument was that the governor failed to comply with constitutional requirements by returning the vetoed bill on May 11 instead of November 20, which was "the first day that the General Assembly [was] in session after . . . adjournment."¹⁶ Because the governor did not comply, the nursing homes argued, the bill became "a law notwithstanding such veto."¹⁷ The trial court found in favor of the governor, but the court of appeals reversed, invalidating the veto.¹⁸

9. H.E.A. 1866, 112th Gen Assem., 1st Reg. Sess. (Ind. 2001).

10. *D&M Healthcare*, 800 N.E.2d at 900.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 903.

15. IND. CONST. art. V, § 14.

16. *D&M Healthcare*, 800 N.E.2d at 900.

17. *Id.*

18. *Id.* at 898.

Justice Boehm, writing for a unanimous court, began his analysis by determining that the nursing homes pointed to no actual harm that befell them as a result of the governor's action, so the court could determine not to address the issue under the doctrine *de minimis non curat lex*, the law does not redress trifles.¹⁹ The doctrine applied to this case because "[p]laintiffs cite no practical consequences of the Governor's delivery of the vetoed bill before the first day the legislature reconvened, rather than on that date. And it is obvious there were none."²⁰

The court indicated that the nursing homes were seeking to capitalize on what was at most a technical defect that, in actuality, harmed no one. The court noted that achieving the purpose of the legal language at issue is "by far the most significant factor" in applying the *de minimis* doctrine.²¹ Because a primary purpose of article V, section 14 was to provide the legislature with the maximum possible time to determine whether to override a veto, the governor's action was not inconsistent with the statutory purpose, but rather provided the maximum possible time for the legislature to act. The court declined to "attribute undue importance to form as opposed to substance,"²² and applied the *de minimis* doctrine to validate the governor's veto.²³ The nursing homes argued that the plain constitutional language required a contrary result, but the court disagreed with this technical argument, countering that "common sense has driven our constitution from the earliest time."²⁴

The court went on, however, to analyze the merits of the case although its application of the *de minimis* doctrine would have been sufficient to decide it. The court looked at the meaning of the phrase in article V, subsection 14(a)(2)(D), "returned by the Governor to the House in which it originated on the first day that the General Assembly is in session after such adjournment," particularly emphasizing the meaning of "returned."²⁵ Although the nursing homes argued that "returned . . . on" could only mean that the governor had to deliver the bill on the precise day when the legislature next met, the court found that the provision was not so clear.²⁶

The governor argued that "if a veto is returned before a given date, in one sense it remains returned at all times after that."²⁷ The court pointed out that this interpretation "turns on whether 'is returned' is a verb (the equivalent of 'to be returned') or a description of its status (it shall be a returned bill on this date)."²⁸ The court looked at the history of the provision—which was enacted in 1972—to

19. *Id.* at 900.

20. *Id.*

21. *Id.* at 902.

22. *Id.*

23. *Id.* at 903 (quoting JOHN SALMOND, JURISPRUDENCE § 10, at 25 (6th ed. 1920)).

24. *Id.* at 901.

25. *Id.* at 906.

26. *Id.*

27. *Id.* at 903.

28. *Id.* at 903-04.

assist in interpreting it. The provision was enacted after the decision in the 1968 "pocket veto" case.²⁹ The 1972 amendment clarified that the governor possessed no "pocket veto" (a tool killing a bill by a governor's mere failure to act when his deadline for signing the bill occurred when the legislature was not in session). The amendment was aimed at establishing procedures for the General Assembly to have the maximum time to determine whether to override or sustain a governor's veto.³⁰

The court noted that the provision's particular phrasing arose from the factual situation at the time the 1972 amendment was adopted. At the time the 1972 amendment was framed, it would not have been possible for a governor to return a bill vetoed after legislative adjournment *before* the next day the legislature met because the legislature lacked a full-time staff.³¹ There would literally have been no one to accept a returned bill after legislative adjournment. Thus, "at the time it was written, Section 14 was seen as both setting a deadline [delivery on the next day the legislature was in session] and requiring that the vetoed bill be available at the earliest possible date to allow the legislature to override it."³²

The court also noted that Governor O'Bannon's construction of the statute was supported by the practices of the legislative and executive branches over the years since 1972. The two houses' journals supported the governor's contention that many vetoed bills had been returned at the time of the veto rather than several months later, at the beginning of the next session.³³ While the factual record was a bit ambiguous, the court concluded that "it is clear that for many years, beginning within a decade of the effective date of the current section 14, at least some vetoes were delivered before the next session without objection by the legislature."³⁴ The General Assembly could have objected, raising the same objection as the nursing homes in this case, in an effort to invalidate previous vetoes. But it did not.

The court found that the governor's practice and the legislature's acquiescence "can build a patina on the constitutional framework."³⁵ The court also noted that section 14 was amended in 1990—after the practice of immediate return of vetoes was well established—and "a subsequent amendment without change in language that has been construed in practice suggests satisfaction with the governors' and the General Assembly's view of how the provision applies."³⁶ That is, if the framers of and voters on the 1990 amendment did not act to correct the manner in which the governor and legislature were applying the language, it can be assumed that they approved that application.

29. *State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Ind. Revenue Bd.*, 242 N.E.2d 642 (Ind. App. 1968), *trans. denied by an equally divided court*, 244 N.E.2d 111 (1969).

30. *D&M Healthcare*, 800 N.E.2d at 904.

31. *Id.* at 905.

32. *Id.* at 906.

33. *Id.* at 907.

34. *Id.* at 908.

35. *Id.*

36. *Id.* at 908-09.

The court also construed the constitutional provision in light of a practical problem raised by the nursing homes' construction. If, as the nursing homes argued, a veto in the spring after the legislature adjourned could not be finalized until the legislature next met—usually the following November—citizens could not be sure exactly what the law was during the intervening months.³⁷ That is, if a veto was not fully effective until it was returned on the “next” legislative session day, those affected by laws could not be sure they would “remain vetoed” during the period between the actual veto in the spring and the return the next winter because the governor could choose not to deliver them or could inadvertently fail to deliver them.³⁸ In a system in which the great majority of statutes go into effect no later than the July 1 after their passage,³⁹ this uncertainty is problematic and the court should not add to the uncertainty by agreeing with the nursing homes' interpretation.⁴⁰

In light of the history of the amendment, the framers' purpose in enacting it, and the practical problems that would be created by adopting the nursing homes' interpretation, the court ruled that Governor O'Bannon followed the constitutional language when he delivered the vetoed bill on the day he vetoed it, rather than waiting until the next legislative session day.⁴¹

The court's decision in *D & M Healthcare* not only resolved the issue in the individual case, it also went far to explicate the court's approach to constitutional litigation. First, the court indicated that it will not intervene in hypothetical disputes or reach out to take positions in cases where the result has no real world consequences.⁴² This clear position instructs litigants—and lower courts—that they should use the judicial system only when the outcome of cases has real meaning to real people, and it reasserts the supreme court's oft-stated position that it will hesitate to intervene in the affairs of the other branches absent a true dispute.⁴³

Second, the court displayed its practical approach to adjudicating controversies involving the other branches. In determining how article V, section

37. Statutes establish that the General Assembly's “organization day” occurs in November, with the first regular session day no later than the second Monday in January. IND. CODE § 2-2.1-1-2 (2004). By statute, the session ends no later than April 29 in odd-numbered years and March 14 in even-numbered years. *Id.* §§ 2-2.1-1-2 to -3. At the time the 1972 amendment was written, however, the legislative session was limited to 61 days every other year and the starting date was constitutionally established in January. IND. CONST. art. IV, § 9 (1970). These provisions dictated, at the time the 1972 amendment was written, that the last session day would usually occur in March or April with the next session beginning the following January.

38. *D&M Healthcare*, 800 N.E.2d at 911.

39. IND. CODE § 1-1-3-3.

40. *D&M Healthcare*, 800 N.E.2d at 911.

41. *Id.* at 911-12.

42. *Id.* at 901-03.

43. See, e.g., *Pence v. State*, 652 N.E.2d 486 (Ind. 1995) (rejecting taxpayer standing, reasoning that it would invite the court to become overly involved in the sphere of the legislative branch absent direct injury to a party).

14 should operate, the court looked at the practical consequences of the alternatives. The court based its decision in part upon the practical construction placed on the provision by the entities most affected by it—the governor and the members of the General Assembly.⁴⁴ Those officials had construed the provision in a particular manner over a period of years, and the court gave weight to that construction. The court also looked at the practical problems that would have been created by departing from that longstanding construction.⁴⁵ The court adopted the construction placed on the provision by the other branches, an approach that precluded the practical problem of uncertainty about which bills would take effect on what dates. The court noted that this approach was consonant with one interpretation of the constitutional language, and it adopted the interpretation that coincided with the other branches' actions and was most workable in practice.⁴⁶

A sidelight to *D & M Healthcare* was its potential effect on judicial pay. Had the nursing homes prevailed, many dozens of other vetoes would have been called into question.⁴⁷ One of the vetoes likely to have been invalidated if the nursing homes had prevailed was the veto of a judicial pay increase.⁴⁸ The court's majority, and Chief Justice Shepard in concurrence, wrote about the importance of a judicial pay increase, which the majority viewed as "long overdue."⁴⁹ The Chief Justice called the absence of a pay raise "ruinous to the state's judiciary."⁵⁰ They noted that there had been no pay increase of any kind in seven years, while other state employees had received cost-of-living increases and health-care costs had risen for all state employees, effecting a reduction in actual judicial pay. Despite the judicial interest in the pay increase, the court adjudicated the appeal "because there is no one else to do it."⁵¹ In upholding Governor O'Bannon's veto, the court acted against its own self-interest because *D & M Healthcare*'s precedent precluded the judicial pay increase.⁵²

B. Separation of Powers

Two court of appeals cases dealt with separation of powers principles. Article III, section 1 of the Indiana Constitution states "[t]he powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged

44. *D&M Healthcare*, 800 N.E.2d at 906-09.

45. *Id.* at 910-11.

46. *Id.* at 911-12.

47. The court enumerated those vetoes in an appendix to its decision. 800 N.E.2d at 912-17.

48. H.E.A. 1856, 112th Gen. Assem., 1st Reg. Sess. (Ind. 2001). This bill was enacted in the same session, and vetoed in the same manner, as the nursing homes' bill.

49. *D&M Healthcare*, 800 N.E.2d at 899.

50. *Id.* at 917.

51. *Id.* at 899.

52. The 2005 General Assembly enacted a judicial pay raise that became law. S.E.A. 363, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”⁵³

*O'Bannon v. Schindler*⁵⁴ was a lawsuit challenging the closing of a state facility for developmentally disabled individuals. Family members of individuals residing at the Muscatatuck State Developmental Center challenged aspects of the center's closing and obtained a preliminary injunction.⁵⁵ The injunction precluded transfer of patients from the facility without providing specified notice to, and obtaining permission from, the patients' guardians.⁵⁶ It also precluded state officials from “pressuring” family members into authorizing transfers and mandated that existing staff at the center could not be removed or reduced.⁵⁷

State officials appealed, and the court's review of the injunction against changing staffing levels at the facility implicated constitutional principles of separation of powers.⁵⁸ Referring to *Logansport State Hospital v. W.S.*,⁵⁹ the court noted that the responsibility for providing facilities for persons with mental illness belongs to the legislative department and that decisions about staffing levels involve the appropriation of state funds.⁶⁰ *W.S.* held that “it is the express duty of the Indiana General Assembly and not of the courts to provide for the staffing and maintenance of facilities” such as Muscatatuck.⁶¹ The *Schindler* court concluded that the judicial requirement that a certain staffing level be maintained constituted improper interference with the legislative task of appropriating funds for the operation of facilities for the mentally ill.⁶² The court therefore vacated the portion of the injunction requiring maintenance of a particular staffing level.⁶³

A second case implicating separation of powers, *Woolley v. Washington Township Small Claims Court*,⁶⁴ addressed the application of the Indiana Access to Public Records Act.⁶⁵ Woolley asked the small claims court for a copy of an affidavit the judge had executed that described certain court procedures. The court apparently did not have a copy of the affidavit and denied the request for

53. IND. CONST. art. III, § 1.

54. 796 N.E.2d 335 (Ind. Ct. App. 2003), *clarified on reh'g*, 801 N.E.2d 189 (Ind. Ct. App. 2003).

55. *Id.* at 337-38.

56. *Id.* at 338.

57. *Id.*

58. *Id.* at 340.

59. 655 N.E.2d 588 (Ind. Ct. App. 1995).

60. The Indiana Constitution requires the provision of mental hospitals. IND. CONST. art. IX, § 1. This provision does not, however, convey to any individual a right to be treated in such a hospital. *Y.A. v. Bayh*, 657 N.E.2d 410 (Ind. Ct. App. 1995).

61. *W.S.*, 655 N.E.2d at 590.

62. 796 N.E.2d at 340.

63. *Id.*

64. 804 N.E.2d 761 (Ind. Ct. App. 2004).

65. IND. CODE §§ 5-14-3-1 to -10 (2004).

the reason that the affidavit was not a public record as defined by the Act.⁶⁶

The Indiana Court of Appeals ruled that the affidavit was not a public record as defined by the statute because the small claims court did not retain a copy.⁶⁷ The document therefore did not fit within the statutory definition of public record.

The court went on, however, to state that applying the Indiana Access to Public Records Act to require disclosure of the affidavit would violate separation of powers principles.⁶⁸ Courts speak through their record books, the court of appeals held, so requiring the court to produce an affidavit describing its internal procedures would interfere with the administration of justice.⁶⁹ Moreover, the court wrote, the trial rules describe which documents constitute court records, and the legislature could not interfere with the internal workings of the judicial branch by changing that definition.⁷⁰ To enforce the Indiana Access to Public Records Act in the manner Woolley sought, the court reasoned, would “hamper the courts in the exercise of their lawful duties.”⁷¹

C. Education

The Indiana Supreme Court granted transfer in a case addressing the meaning of article VIII’s requirement that, in public schools, “tuition shall be without charge.”⁷² At issue in *Nagy v. Evansville-Vanderburgh School Corp.*⁷³ was a twenty dollar student activity fee imposed on all students from kindergarten through twelfth grade. The school corporation stated that the fee was designed to pay for a coordinator of student services; elementary school counselors; media specialists; school nurses; alternative education; police liaison; and extracurricular activities.⁷⁴ The fee was created as part of an agreement between the school corporation and teachers’ union to balance the corporation’s budget.⁷⁵ There was no provision to waive the fee based on inability to pay.⁷⁶

66. *Woolley*, 804 N.E.2d at 762, 765.

67. *Id.* at 765.

68. *Id.* at 767.

69. *Id.* at 766.

70. *Id.* at 766-67.

71. *Id.* at 767.

72. IND. CONST. art. VIII, § 1.

73. 808 N.E.2d 1221 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 977 (Ind. Ct. App. 2004). A link to the oral argument on transfer may be found at <http://www.indianacourts.org/apps/webcasts/>. This Article contains discussions of three cases in which the court of appeals’ opinions have been vacated by grant of transfer: *Nagy*, 808 N.E.2d 1221; *Clinic for Women v. Brizzi*, 814 N.E.2d 1042 (Ind. Ct. App. 2004), *trans. granted*, (Ind. Jan. 27, 2005); and *Ledbetter v. Hunter*, 810 N.E.2d 1095 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 982 (Ind. 2004). Although these three opinions have been vacated, they are discussed in the Article because they raise important constitutional issues and their reasoning is original and provocative.

74. *Nagy*, 808 N.E.2d at 1223.

75. *Id.*

76. *Id.*

Judge Sullivan's court of appeals opinion (vacated by the transfer grant) invalidated the fee, concluding that the purpose of the constitutional provision was to encourage learning and literacy, and that fees of the sort charged by the school were inimical to that purpose. Parsing the meaning of "tuition" as used by the framers, the court concluded that "Article 8, Section 1 must be interpreted to mean that not only must Indiana public schools not charge for 'tuition' in the sense of the services of a teacher or instruction, but also must not charge for those functions and services which are by their very nature essential to teaching or 'tuition.'"⁷⁷ The majority opinion also cast doubt on *Chandler v. South Bend Community School Corp.*,⁷⁸ an earlier case analyzing the same constitutional provision and approving Indiana's ubiquitous textbook rental fees.⁷⁹ The majority opinion also hinged on the fact that the school placed the proceeds of the activity fee in its general fund, so the uses made of the activity fee could not be distinguished from other purposes of the fund, such as teacher salaries, that clearly qualified as "tuition."⁸⁰ Because the activity fee could not be segregated from other school revenue, the school was unable to prove that the activity fee was used only for non-essential school programs.⁸¹

In dissent, Judge Bailey emphasized Indiana's long history of local control of schools and educational spending decisions. He also concluded that the majority's interpretation of "tuition" in article VIII, section 1 was too broad.⁸² He stated that the majority's fear that school boards would charge high fees, effectively excluding some students from public education, would not come to pass because local school boards must be sensitive to political concerns in their communities.⁸³

D. Home Rule

The Indiana Supreme Court analyzed a local ordinance regarding state acquisition of land in *Indiana Department of Natural Resources v. Newton County*.⁸⁴ Apparently motivated by its desire to keep land on the tax rolls, Newton County enacted ordinances designed to inhibit the State from purchasing land for conservation purposes. The ordinances required the state, before purchasing land in Newton County, to file a statement of intent describing the effect of the purchase on the county's economy, environment, and tax base.⁸⁵ Filing the statement would trigger a one-year process of public hearings by local

77. *Id.* at 1230.

78. 312 N.E.2d 915 (Ind. Ct. App. 1974).

79. *Nagy*, 808 N.E.2d at 1230.

80. *Id.* at 1233.

81. *Id.* at 1234-35.

82. *Id.* at 1236.

83. *Id.* at 1237.

84. 802 N.E.2d 430 (Ind. 2004).

85. *Id.* at 432.

governmental bodies.⁸⁶ Violating the ordinances would subject the state to fines.⁸⁷ The state wished to acquire a particular parcel in Newton County as game bird habitat.⁸⁸

The supreme court invalidated the ordinances. The county attempted to defend the ordinances under the Indiana Home Rule Act,⁸⁹ but that statute does not allow local governments to regulate state conduct, the court concluded.⁹⁰ The Indiana Home Rule Act does not explicitly exempt state agencies from local regulation, but a local ordinance impermissibly conflicts with state law if it purports to restrict an activity specifically authorized by a statute, as state acquisition of game bird habitat is statutorily authorized.⁹¹

The court also reversed the trial court's holding that the game bird habitat act is invalid because it is unconstitutionally vague. The county alleged vagueness because the statute did not define "game bird habitat" (although it did define "game bird") or "willing seller."⁹² The court rejected this argument, holding that "statutory terms must be understandable, but they need not be rigorously precise."⁹³ The court also rejected the county's "parade of horrors" as to the misdeeds the state could undertake pursuant to the statute, noting the absence of any evidence of misconduct in this case.⁹⁴ The court further rejected the county's argument that the legislation could not be effective without interpretive rules defining the terms, as none were required by the statute nor, the court ruled, were they necessary to provide sufficient specificity.⁹⁵

E. Election Fraud

*Pabey v. Pastrick*⁹⁶ is not a constitutional case, but it illustrates the Indiana Supreme Court's willingness to enter a largely political conflict to apply rules of law. The court acted similarly in the 2003 Indianapolis City-County Council redistricting case, *Peterson v. Borst*.⁹⁷ George Pabey, challenging longtime incumbent Mayor of East Chicago Robert Pastrick, lost the initial count in the election but filed a contest, alleging widespread fraud.⁹⁸ The trial court found many instances of blatant fraud and illegality and invalidated many votes, but not

86. *Id.*

87. *Id.*

88. *Id.*

89. IND. CODE § 36-1-3-4 (2004) (giving local governments "all other powers necessary or desirable in the conduct of its affairs").

90. *Newton County*, 802 N.E.2d at 433.

91. *Id.*

92. *Id.* at 434.

93. *Id.*

94. *Id.*

95. *Id.* at 434-35.

96. 816 N.E.2d 1138 (Ind. 2004).

97. 786 N.E.2d 668 (Ind. 2003). See Laramore, *supra* note 1, at 942-45.

98. *Pabey*, 816 N.E.2d at 1140, 1144.

a sufficient number of votes to give Pabey the majority.⁹⁹ The question for the supreme court was whether, under the applicable statute, there was a “deliberate act or series of actions . . . making it impossible to determine the candidate who received the highest number of votes cast in the election.”¹⁰⁰

In a 3-2 decision, the court invalidated the election results based on the widespread fraud. The court relied on the trial court’s lengthy and detailed findings that: non-English speakers were taken advantage of in absentee voting; absentee voters were unlawfully compensated; absentee voters were unlawfully “assisted” to vote for the incumbent; voters used vacant lots as voting addresses; the incumbent’s supporters possessed many unmarked absentee ballots without authorization; the incumbent’s supporters routinely filled out absentee ballots for others; voters violated the absentee voting statute by stating false reasons why they would be qualified to vote absentee; votes were cast by individuals not living in the city; and other irregularities occurred.¹⁰¹ The trial court also noted Pabey’s difficulty in finding evidence because of intimidation and because many potential witnesses would be admitting illegal acts if they testified.¹⁰²

Admitting that the statutory language was ambiguous, the court nonetheless invalidated the result and ordered a special election. It concluded that a challenger in Pabey’s position was required to prove that acts occurred to make it impossible to determine which candidate received the most legal votes cast and the actions “so infected the election process as to profoundly undermine the integrity of the election and the trustworthiness of its outcome.”¹⁰³

The court ruled that the election was characterized by “a widespread and pervasive pattern of deliberate conduct calculated to cast unlawful and deceptive ballots” so that the election results were unreliable.¹⁰⁴ Pabey did not have to disqualify sufficient specific ballots to give himself the highest number of votes in the context of this widespread and difficult to prove corruption.

Justice Boehm dissented, joined by Justice Sullivan. Analyzing the statute, Justice Boehm concluded that it was not “impossible” to determine which candidate received the highest number of legal votes.¹⁰⁵ The trial judge had disqualified many ballots, but Pastrick still had the highest number. He also criticized the court’s construction of the absentee ballot statute, concluding that some ballots invalidated by the trial court should have been counted.¹⁰⁶ Because Pabey failed to prove that he actually received the most legal votes, the dissenters would not have upset the election result.¹⁰⁷

99. *Id.* at 1140.

100. IND. CODE § 3-12-8-2 (2004).

101. *Pabey*, 816 N.E.2d at 1145.

102. *Id.* at 1146-47.

103. *Id.* at 1150.

104. *Id.* at 1151.

105. *Id.* at 1155.

106. *Id.*

107. *Id.* at 1156.

II. THE RIGHTS CONSTITUTION

A. Privacy and Free Expression

In *Clinic for Women, Inc. v. Brizzi*,¹⁰⁸ the Indiana Court of Appeals invalidated portions of Indiana's eighteen-hour waiting period statute for abortions, basing its decision in part on a right to privacy in article I, section 1 of the Indiana Constitution.¹⁰⁹ The challenged statute requires women seeking abortion to obtain in-person counseling at least eighteen hours before the abortion is performed, with counselors providing certain information mandated by law.¹¹⁰ In practice, the statute generally requires a woman to travel to the abortion-providing facility at least twice.¹¹¹

Plaintiffs alleged that the statute violated their privacy rights, and the court of appeals agreed. "We find that privacy not only animates article I, sec. 1, but permeates the atmosphere created by our constitution and extends to all our citizens, including women seeking to exercise their right to obtain an abortion."¹¹² The court labeled privacy a "core value," a concept used in previous cases to identify rights that can be legislatively regulated, but not abridged.¹¹³ The court found that privacy concepts abide not only in article I, section 1 but also in portions of the constitution relating to religion (article I, sections 2, 3, and 4), speech (article I, section 9), search and seizure (article I, section 11) "and numerous other rights enumerated in the Indiana Constitution."¹¹⁴ The court found privacy concepts undergirding previous case law, especially *In re Lawrance*,¹¹⁵ which held that an individual has a right to make decisions about his or her own health care.¹¹⁶ Cases under article I, section 1 holding that individuals have a right to engage in lawful businesses also are rooted in privacy concepts,

108. 814 N.E.2d 1042 (Ind. Ct. App. 2004), *trans. granted* (Ind. Jan. 27, 2005).

109. The text of article I, section 1, is as follows:

WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

IND. CONST. art. I, § 1.

110. IND. CODE § 16-34-2-1.1 (2004).

111. *Clinic for Women*, 814 N.E.2d at 1045-46 (referring to two-trip requirement).

112. *Id.* at 1047.

113. *Id.* at 1049. See also *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443 (Ind. 2001) (discussing concept of core value); *Price v. State*, 622 N.E.2d 954 (Ind. 1993).

114. *Clinic for Women*, 814 N.E.2d at 1047.

115. 579 N.E.2d 32 (Ind. 1991).

116. *Clinic for Women*, 814 N.E.2d at 1047 (citing *Lawrance*, 579 N.E.2d at 38-39).

the court found.¹¹⁷ The court found privacy concepts animating various Indiana statutes on subjects ranging from employment records to voting rights.¹¹⁸

The court “ma[d]e explicit what heretofore has been implicit: The citizens of Indiana have a fundamental right of privacy inherent in and protected by our state constitution.”¹¹⁹ The court did not fully define that right, but stated that “it extends to the right to make decisions about our health and the integrity of our minds and bodies.”¹²⁰ The privacy right, the court ruled, encompasses the right to abortion.¹²¹

Applying the “core value” analysis to the 18-hour waiting period statute, the court considered whether the law “materially burdens” the exercise of the constitutional right. The “material burden” analysis, originating in *Price*, seeks to determine whether a “right, as impaired [by a challenged statute], would no longer serve the purpose for which it was designed.”¹²² If the right no longer serves its purpose, it is “materially burdened,” and the impairment violates the constitution.¹²³

The court ruled that the case must be remanded to the trial court for a factual determination whether the challenged statute materially burdens the core value of privacy found in article I, section 1.¹²⁴ The court recounted factual findings from cases analyzing similar statutes in other states, which indicate that waiting periods lead to stress and physical symptoms for women who must undergo them, with few offsetting benefits.¹²⁵ Quoting Justice Stevens’s opinion in a federal decision on abortion waiting periods, the court also noted that the waiting period “appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women,” so that the waiting period for abortions—mandated only for abortions and for no other medical procedures—may infringe women’s liberty without any factual basis.¹²⁶

The court also analyzed a free expression issue raised by the statute, applying article I, section 9.¹²⁷ The statute compels physicians to provide certain state-mandated information to women before abortions can be performed.¹²⁸ Plaintiffs

117. *Id.* at 1047-48.

118. *Id.* at 1048.

119. *Id.*

120. *Id.*

121. *Id.* at 1049.

122. *Id.* at 1050 (citing *Price v. State*, 622 N.E.2d 954, 960 n.7 (Ind. 1993)).

123. *Id.*

124. *Id.* at 1052.

125. *Id.* at 1051.

126. *Id.* at 1052 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 918 (1992) (Stevens, J., dissenting)).

127. *Id.* at 1053. The text of article I, section 9, is as follows: “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” IND. CONST. art. I, § 9.

128. IND. CODE § 16-34-2-1.1 (2004).

challenged this provision of the statute, arguing that the "compelled speech" violated physicians' rights to free expression.¹²⁹ No Indiana court previously had addressed whether "compelled speech" was protected by article I, section 9.

The court ruled that "compelled speech" is covered by article I, section 9, noting that the constitutional provision has broad scope—broader than the first amendment.¹³⁰ Because the first amendment addresses "compelled speech" and section 9 is even broader, the court ruled that section 9 also encompasses "compelled speech" within its scope.¹³¹

But the court ruled that the particular provisions of the abortion-waiting-period statute do not violate section 9. The "core value" in section 9 is political speech.¹³² The court ruled that the speech compelled by the abortion statute is not political in nature.¹³³ Rather, the "compelled speech" is an appropriate exercise of the state's police power, exercised to protect the citizenry's health, safety, comfort, morals and welfare.¹³⁴ Because the "compelled speech" falls under the state's regulatory or police power, it is upheld so long as it is supported by a rational basis. In this case, the court ruled, the "compelled speech" "does tend to promote the health and welfare of women seeking to obtain an abortion, which is a legitimate state interest, by advising women of the risks of the procedure."¹³⁵

Judge Baker dissented in part from the court's opinion. He disagreed with the court's placement of a right to privacy in article I, section 1, instead of grounding it in article I, section 21.¹³⁶ He agreed with the court's result relating to privacy, however, concurring that the waiting period statute transgressed that right.¹³⁷ He also dissented as to the need to remand the case for additional factfinding. Because the Indiana Constitution requires that men and women be treated equally, Judge Baker argued, the abortion statute must be invalidated because it requires certain warnings to be provided only to women and, thus, "inherently treats men and women differently."¹³⁸ Indiana law mandates specific informed consent procedures only for abortion, and abortions can only be obtained by women.

A woman's ability to make an informed decision about her own health is not affected by the fact that she is pregnant, and, therefore, there is no rational relationship to the legitimate government interest of providing medical information in requiring women to receive that information

129. *Clinic for Women*, 814 N.E.2d at 1053.

130. *Id.*

131. *Id.*

132. *Price v. State*, 622 N.E.2d 954, 964-65 (Ind. 1993).

133. *Clinic for Women*, 814 N.E.2d at 1056.

134. *Id.*

135. *Id.* at 1057.

136. *Id.* at 1058. Judge Baker believed that the Indiana Supreme Court, in *State ex rel. Mavity v. Tyndall*, 74 N.E.2d 914 (Ind. 1947), found a right to privacy grounded in section 21.

137. *Id.*

138. *Id.* at 1059.

differently than men. Nothing indicates that women must receive medical information differently than men, and to suggest so is facially discriminatory.¹³⁹

The facial discrimination required the law to be invalidated, Judge Baker argued.

In its recounting of privacy protections under the Indiana Constitution, the court omitted *Doe v. O'Connor*,¹⁴⁰ a case the Indiana Supreme Court decided just a few months before the court of appeals handed down *Clinic for Women*. In the context of a challenge to Indiana's sex offender registry,¹⁴¹ the Indiana Supreme Court ruled that article I, section 1 was not, in and of itself, the source of a right to privacy.¹⁴² Relying on construction of similar provisions in other state constitutions, the Indiana Supreme Court ruled that article I, section 1 cannot be "the sole basis" for a constitutional challenge on privacy grounds because it "is not so complete as to provide courts with a standard that could be routinely and uniformly applied."¹⁴³ It is not clear whether the court of appeals' invocation of other provisions of the constitution protecting privacy is sufficient to satisfy the supreme court's concern that section 1 not be the "sole basis" for state constitutional privacy rights.

B. Equal Privileges and Immunities

In *Kelver v. State*,¹⁴⁴ an individual argued that the requirement that he wear a seat belt violated article I, section 23 because it applied only to passenger cars and not to trucks.¹⁴⁵ Kelver was convicted of failing to wear a seat belt in his GMC "Jimmy," and he then challenged the constitutionality of the law under which he was convicted.

Under the applicable statutes, individuals in the front seat of "passenger motor vehicles" are required to wear seatbelts, but persons in "trucks" are not.¹⁴⁶ Under applicable law, a "truck" is a "motor vehicle designed, used or maintained primarily for the transportation of property."¹⁴⁷ Kelver argued that trucks have no characteristics inherently different from passenger motor vehicles, so that there is no basis for different treatment that passes muster under section 23. The Indiana Supreme Court has posited a two-part test to analyze classifications under section 23: "First, the disparate treatment accorded to the legislation must be reasonably related to inherent characteristics which distinguish the unequally

139. *Id.* at 1060.

140. 790 N.E.2d 985 (Ind. 2003).

141. IND. CODE §§ 5-2-12-1 to -14 (2004).

142. See Laramore, *supra* note 1, at 962-63.

143. *O'Connor*, 790 N.E.2d at 991.

144. 808 N.E.2d 154 (Ind. Ct. App. 2004).

145. *Id.* at 157. The text of article I, section 23, is as follows: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.

146. IND. CODE §§ 9-19-10-2; 9-13-2-123.

147. *Id.* § 9-13-2-188(a).

treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.”¹⁴⁸ Kelter introduced evidence from law enforcement officers showing that various officers applied different standards to distinguish between trucks and passenger motor vehicles for purposes of enforcing the seat belt law.¹⁴⁹

The State defended the differential treatment, arguing that trucks are different in several ways, including that they provide more structural protection in collisions.¹⁵⁰ The court agreed that there are inherent differences between passenger motor vehicles and trucks allowing different treatment under the seat belt law.¹⁵¹ The court noted that the Bureau of Motor Vehicles determines what constitutes a truck for licensing purposes, undermining Kelter’s argument that it is difficult to tell the difference between a truck and a passenger motor vehicle.¹⁵²

The supreme court granted transfer in a significant case applying the Equal Privileges and Immunities Clause, *Ledbetter v. Hunter*.¹⁵³ In *Ledbetter*, the court of appeals’ opinion (vacated by the transfer grant) found unconstitutional a portion of Indiana’s medical malpractice statute regarding statutes of limitations for claims by minors. This same provision had been upheld by the supreme court in the seminal 1980 case *Johnson v. St. Vincent Hospital*,¹⁵⁴ but the court of appeals revisited the issue and applied a constitutional analysis that has been developed since 1980 to reach a different result.¹⁵⁵

Indiana’s medical malpractice law sets a two-year, occurrence-based statute of limitations for minors’ claims.¹⁵⁶ In *Johnson*, the supreme court found that this provision met constitutional requirements even though it was different from the statutes of limitations for all other claims by minors.¹⁵⁷ *Johnson* held that the limitations period is “reasonably relate[d] to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs” in two ways.¹⁵⁸ First, the shorter limitations period would hold down malpractice premiums. Second, the faster period would allow cases to be tried faster, so that evidence would not be lost and memories would not fade.¹⁵⁹

Ledbetter addressed these two rationales head-on under the two-part Equal

148. *Kelter*, 808 N.E.2d at 156 (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

149. *Id.* at 157.

150. *Id.*

151. *Id.*

152. *Id.* at 148. See also *Owen v. State*, 796 N.E.2d 775 (Ind. Ct. App. 2003) (decision by BMV whether to license vehicle as truck or passenger motor vehicle determines vehicle’s status for seat belt law purposes).

153. 810 N.E.2d 1095 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 982 (Ind. 2004).

154. 404 N.E.2d 585 (Ind. 1980).

155. *Ledbetter*, 810 N.E.2d at 1098-99.

156. IND. CODE § 34-18-7-1 (2004).

157. See *id.* § 34-11-6-1 (statute of limitations for other claims by minors).

158. *Ledbetter*, 810 N.E.2d at 1100 (citing *Johnson*, 404 N.E.2d at 590).

159. *Id.* at 1100-01.

Privileges and Immunities standard announced fourteen years after *Johnson* was decided.¹⁶⁰ The current standard analyzes disparate legislative classifications to determine whether they are reasonably related to inherent characteristics that distinguish the classes, then evaluates whether uniform treatment is available to all those similarly situated.¹⁶¹

The plaintiffs had done extensive discovery of the insurance industry, and no evidence turned up showing that the limitations period on minors' malpractice claims had any effect on insurance rates or on the availability of medical services.¹⁶² This lack of evidence negated *Johnson*'s first basis for upholding the limitations period: there was no evidence of any reasonable relationship between the differential treatment and any inherent characteristic of the class of minor malpractice plaintiffs.¹⁶³ The court of appeals also rejected the second basis for the different limitations period, prompt presentation of claims, because there was no basis to differentiate malpractice claims by minors from all other tort claims by minors, which are governed by a longer limitations period. This rationale was invalid under the second prong of the section 23 test because the same treatment was not uniformly applicable to all persons (in this case, minor tort plaintiffs) similarly situated.¹⁶⁴

In previous years, courts applying section 23 had some difficulty in determining exactly how to define the classes to be compared under the two-step analysis.¹⁶⁵ The cases decided in the most recent year did not present that problem.

C. Open Courts

Two Indiana Court of Appeals decisions confirmed the right of prisoners under the Open Courts Clause of article I, section 12 to participate in certain civil legal proceedings while incarcerated. In *Murfitt v. Murfitt*,¹⁶⁶ the prisoner filed a motion to participate by alternative means in his divorce hearing, but the trial court denied the motion.¹⁶⁷ The trial court also denied his subsequent motions to be transported to court for the trial and to have counsel appointed for him as an indigent.¹⁶⁸ Relying on the language in section 12 that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law," the court of appeals reversed and

160. See *supra* note 148 and accompanying text.

161. See *supra* note 148 and accompanying text.

162. 810 N.E.2d at 1101.

163. *Id.*

164. *Id.* at 1101-03.

165. See Laramore, *supra* note 1, at 961-62 (discussing *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *AlliedSignal Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003); *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000)).

166. 809 N.E.2d 332 (Ind. Ct. App. 2004).

167. *Id.* at 333.

168. *Id.*

remanded, ordering the trial court to determine a method by which Murfitt could participate in the hearing.¹⁶⁹

Similarly, in *Sabo v. Sabo*,¹⁷⁰ the prisoner's attempt to participate in his divorce hearing by telephone was complicated by withdrawal of his counsel, the timing of which left the prisoner both unrepresented and unable to participate personally.¹⁷¹ Again relying on section 12, the court of appeals ruled that "some means must exist by which a plaintiff or defendant can prosecute or defend his or her civil claim while still incarcerated."¹⁷² The court of appeals reversed and remanded, also ordering the trial court to provide a method for the prisoner to participate.¹⁷³

D. Right to Be Present at Trial

In *Jordan v. Deery* in 2002,¹⁷⁴ the Indiana Supreme Court held that the jury trial right conveyed in article I, section 20 also included a party's right to be present at the party's trial "absent waiver or extreme circumstances."¹⁷⁵ *Niksich v. Cotton* assisted in defining "extreme circumstances" under article I, section 20.¹⁷⁶ Niksich was a prisoner who brought a small claims case when his television was broken.¹⁷⁷ The case mainly dealt with procedural requirements of the small claims rules.

Niksich also claimed that he had a right to be present at his small claims trial.¹⁷⁸ The court ruled that he had no such right. Rather, an incarcerated plaintiff "may seek to submit the case through documentary evidence, to conduct the trial by telephonic conference, to secure someone else to represent him at trial, or to postpone the trial until his release from incarceration."¹⁷⁹ Incarceration is therefore apparently an "extreme circumstance" under the *Jordan* standard.

E. Incarceration for Debt

Article I, section 22 establishes that "there shall be no imprisonment for debt, except in case of fraud."¹⁸⁰ In 1993, the Indiana Supreme Court placed a gloss on this provision relating to child support. Incarceration for failure to pay child support did not violate section 22, the court held, because "child support obligations arise out of a natural duty of the parent and not from a debt of the

169. *Id.* at 334-35; IND. CONST. art. I, § 12.

170. 812 N.E.2d 238 (Ind. Ct. App. 2004).

171. *Id.* at 240-41.

172. *Id.* at 242.

173. *Id.* at 245.

174. 778 N.E.2d 1264 (Ind. 2002).

175. *Id.* at 1272.

176. 810 N.E.2d 1003 (Ind. 2004).

177. *Id.* at 1004.

178. *Id.* at 1008.

179. *Id.*

180. IND. CONST. art. I, § 22.

obligor.”¹⁸¹

Following fifty-three-year-old precedent,¹⁸² the Indiana Court of Appeals ruled in *In re Paternity of L.A.* that section 22 bars incarceration for child support obligations after the youngest child is emancipated.¹⁸³ The court ruled that Indiana courts consistently had followed the 1952 supreme court ruling in *Corbridge*, limiting imprisonment for contempt for nonpayment of child support to situations in which the children were unemancipated.¹⁸⁴

The court of appeals made this ruling in the face of legislative language apparently mandating a contrary result. In 2002, in reaction to another appellate decision limiting contempt to situations in which the children are unemancipated, the General Assembly enacted a statute making “contempt and all other remedies for the enforcement of a child support order available to assist in the enforcement of a child support order regardless of whether the child for whom the child support was ordered is emancipated.”¹⁸⁵ The court of appeals stated that it was bound by *Corbridge*, however, not to extend imprisonment for contempt to situations where the children for whom support was owing were emancipated.¹⁸⁶

F. Double Jeopardy

In 2003 and 2004, the Indiana Court of Appeals applied recent state constitutional double jeopardy principles in a number of cases.

The underage defendant in *Lawson v. State*¹⁸⁷ had been convicted of illegal possession of alcohol and illegal consumption of alcohol, and the court of appeals raised the double jeopardy issue sua sponte. Lawson was arrested after a police officer saw him place a beer bottle on the floor of the van in which he was a passenger and because he had an odor of alcohol on his breath. When he was arrested, other empty beer bottles were within his reach.¹⁸⁸

The court vacated Lawson’s conviction for possession (the lesser offense) because “[he] was convicted twice for the same behavior.”¹⁸⁹ Under *Richardson v. State*, two convictions violate state constitutional double jeopardy principles if “with respect to . . . the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another

181. *Pettit v. Pettit*, 626 N.E.2d 444, 444 (Ind. 1993).

182. *Corbridge v. Corbridge*, 102 N.E.2d 764 (Ind. 1952).

183. 803 N.E.2d 1196 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 975 (Ind. 2004).

184. *Id.* at 1199.

185. Act of Mar. 14, 2002, § 6, 2002 Ind. Acts 39. This expression of legislative intent was not codified. The portion of the act that was codified states, “[n]otwithstanding any other law, all orders and awards contained in a child support decree . . . may be enforced by contempt,” with exceptions not applicable to this analysis. IND. CODE § 31-16-12-1 (2004).

186. *In re Paternity of L.A.*, 803 N.E.2d at 1201.

187. 803 N.E.2d 237 (Ind. Ct. App. 2004).

188. *Id.* at 239.

189. *Id.* at 243.

challenged offense.”¹⁹⁰ In *Lawson*, the court of appeals also relied on the analysis in Justice Sullivan’s concurring opinion in *Richardson*, which stated that Indiana’s double jeopardy clause prohibits “conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished.”¹⁹¹ The court held that *Lawson*’s convictions were covered by this language, so that the lesser conviction had to be vacated under double jeopardy principles.¹⁹²

The court of appeals applied the same principles in *Vandergriff v. State*,¹⁹³ but with different results. *Vandergriff* was convicted of neglect of a dependent and battery, his infant son being the victim of both crimes. The acts serving as the basis for *Vandergriff*’s convictions included ripping the baby from his mother’s arms, throwing the baby into a carseat and speeding off, then later tossing the baby onto the floor.¹⁹⁴

The State argued on appeal that *Vandergriff*’s several acts supported more than one conviction. The court was not required to analyze that argument, however, because “even assuming the jury relied upon the same incident to establish the two offenses, additional evidentiary facts were required to prove each offense.”¹⁹⁵ The neglect conviction required proof that the child was *Vandergriff*’s dependent and that he was in *Vandergriff*’s care, custody, and control.¹⁹⁶ The battery conviction required proof that the child was less than fourteen years old and *Vandergriff* was more than eighteen years old.¹⁹⁷ Because different evidence was required to prove these elements, the court ruled there was no constitutional double jeopardy violation.¹⁹⁸

The *Vandergriff* court also looked at whether any statutory or common law double jeopardy rules were violated, applying an interesting gloss on relevant supreme court precedents. The court first reviewed the five categories of convictions barred by statutory or common law double jeopardy principles enumerated in Justice Sullivan’s concurrence in *Richardson*.¹⁹⁹ Then, supported by Justice Boehm’s dissent in *Guyton*, the court looked beyond the evidence adduced at trial to the statutes, charging instruments, and arguments of counsel to determine whether the facts establishing one conviction also established the

190. 717 N.E.2d 32, 49 (Ind. 1999).

191. *Lawson*, 803 N.E.2d at 243 (quoting *Richardson*, 717 N.E.2d at 56 (Sullivan, J., concurring)).

192. It could be argued that *Lawson*’s two convictions are not for “the very same act” because the actual conduct prohibited by the two statutes is different (i.e., consumption and possession), although the evidence used to convict is identical.

193. 812 N.E.2d 1084 (Ind. Ct. App. 2004).

194. *Id.* at 1085-86.

195. *Id.* at 1087.

196. *Id.*

197. *Id.*

198. *Id.* at 1088.

199. *Id.*

other.²⁰⁰

The court noted that Vandergriff's two convictions might be invalid under the second category in Justice Sullivan's analysis: "conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished."²⁰¹ This possible invalidity was supported by the fact that the prosecutor did not argue to the jury that each conviction was supported by a different act, but rather left it to the jury to determine which convictions should be supported by which facts.²⁰²

But because the prosecutor in closing argument relied on the grabbing incident as the primary support for the neglect conviction and on the tossing incident as the primary support for the battery conviction, the court concluded that although "we cannot say that there is no reasonable possibility that the jury used the same evidence to support the neglect and battery charges, . . . we can say that the facts supporting the two crimes are separate and distinct and, thus, no common law double jeopardy violation occurred."²⁰³ The court therefore did not invalidate either conviction.

The court of appeals also applied other elements of Justice Sullivan's five part test for double jeopardy. In *Holden v. State*, the court ruled that a defendant could not properly be convicted of both robbery and conspiracy to commit robbery because the overt act of the *conspiracy*, as instructed by the judge, was the robbery itself.²⁰⁴ This outcome violated the prohibition against two convictions based on the same evidence because the evidence establishing the overt act of the conspiracy was exactly the same evidence establishing the robbery.²⁰⁵ In *Vennard v. State*, the court ruled that the defendant could not be convicted of both robbery, elevated to A felony because of serious bodily injury, and murder because the murder was the "serious bodily injury" required to prove that the robbery conviction should be enhanced to A-felony status.²⁰⁶ The enhancement had to be vacated, relegating the robbery to B-felony status, under Justice Sullivan's injunction against "conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished."²⁰⁷

In *Jones v. State*, the court of appeals also looked into an allegation that double jeopardy principles were violated by a conviction after civil remedies had been imposed.²⁰⁸ Jones was convicted of nonsupport of a dependent child after

200. *Id.* (citing *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002)).

201. *Id.*

202. *Id.* at 1089-90.

203. *Id.* at 1090.

204. 815 N.E.2d 1049, 1056 (Ind. Ct. App. 2004), *trans. denied* (Ind. Jan. 6, 2005).

205. *Id.* at 1056.

206. 803 N.E.2d 678, 679 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 803 (Ind. 2004).

207. *Id.* at 682.

208. 812 N.E.2d 820 (Ind. Ct. App. 2004).

being sanctioned for contempt for failure to support his child.²⁰⁹ Under federal double jeopardy law, the relevant question is whether the civil sanction constitutes punishment.²¹⁰ Because the contempt in Jones's case was intended to coerce him to pay child support, it was remedial rather than punitive, so the criminal prosecution did not violate federal double jeopardy principles.²¹¹

Under the Indiana Constitution, the court applied a different analysis but reached the same result. The court concluded that state constitutional double jeopardy analysis applies only to two statutorily defined crimes.²¹² The court derived this conclusion from *Richardson*, which said that the purpose of the "same elements" and "same evidence" double jeopardy tests "is to determine whether the essential elements of separate *statutory crimes charged* could be established hypothetically."²¹³ Because the *Richardson* analysis applies only to "statutory crimes," and civil contempt is not a statutory crime, state double jeopardy principles do not bar the prosecution.²¹⁴ In the end, this analysis is not much different than the federal analysis: the federal question is whether the contempt is punitive; the state question is whether the contempt is criminal. In most cases, the answers to these questions will be the same.

These cases show that the court of appeals is taking seriously the supreme court's case law on double jeopardy under the Indiana Constitution, although the underlying doctrine remains a bit muddled. The basic principle of *Richardson*, barring a conviction when either the same elements or same evidence used for conviction of one crime is used again to convict of a second crime, is now sufficiently established that the court of appeals even applied it in one case sua sponte.²¹⁵ The mechanics of the analysis remain less clear, however. Some panels of the court of appeals use straightforward "same elements" and "same evidence" analysis directly from *Richardson*.²¹⁶ Other panels use the five categories (including constitutional, statutory, and common law double jeopardy concepts) established by Justice Sullivan in his *Richardson* concurrence.²¹⁷ Other cases derive principles from Justice Boehm's dissent in *Guyton*, which heavily criticized *Richardson*.²¹⁸

G. Search and Seizure

The court of appeals applied state constitutional search and seizure principles in a number of cases. Article I, section 11 prohibits unreasonable searches, and

209. *Id.* at 822.

210. *Id.*

211. *Id.* at 823.

212. *Id.* at 824.

213. *Id.* (quoting *Richardson v. State*, 717 N.E.2d 37, 50 (Ind. 1999) (emphasis added)).

214. *Id.* at 824-25.

215. *Lawson*, 803 N.E.2d at 243.

216. *E.g., Holden*, 815 N.E.2d at 1057.

217. *E.g., Vennard*, 803 N.E.2d at 682.

218. *E.g., Vandergriff*, 812 N.E.2d at 1088.

cases have determined that the standard refers solely to the reasonableness of law enforcement conduct.²¹⁹

Osborne v. State, adds specificity to the definition of reasonable law enforcement conduct.²²⁰ In *Osborne*, police were contacted by an informant who said he would be bringing Osborne to French Lick, Indiana, and that Osborne would possess cocaine.²²¹ The informant said he would identify himself by driving over the posted speed limit, giving police an excuse to stop the car and search Osborne.²²² In exchange, the informant sought consideration for his girlfriend, who was facing unrelated cocaine charges.²²³ Police knew that the informant was on home detention and had been consuming cocaine and alcohol on the day he was driving Osborne to French Lick.²²⁴ The operation went as planned, and police arrested Osborne for possessing cocaine.

The court of appeals ruled that the evidence against Osborne must be suppressed, holding that police conduct in arresting him was unreasonable.²²⁵ The court criticized police for allowing an individual on home detention, whom they knew to have ingested alcohol and cocaine, to drive at higher-than-posted speed in a populated area. The court called the informant's conduct "outrageously dangerous" and contrary to established policies against driving while impaired.²²⁶ The court was particularly critical of police for allowing the informant to participate in the arrest while he was supposed to be on home detention as punishment for a separate crime.²²⁷

Other court of appeals cases applied article I, section 11 in the context of garbage searches.²²⁸ Both of these cases mentioned *State v. Stamper*,²²⁹ a 2003 case that appeared to establish a "bright line" test holding that any law enforcement search of garbage that required trespass was per se unreasonable under the Indiana Constitution.

In *Mast v. State*, the garbage was in a dumpster that sat far back from the

219. *E.g.*, *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994) ("reasonableness of the official behavior must always be the focus of our state constitutional analysis").

220. 805 N.E.2d 435 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

221. *Id.* at 437.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 441.

226. *Id.* at 440.

227. *Id.* at 440-41.

228. The Indiana Supreme Court accepted transfer in one garbage search case, *Litchfield v. State*, 808 N.E.2d 713 (Ind. Ct. App. 2004), during the period covered by this Article. It issued its opinion in *Litchfield* after the period covered by this Article. *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). The supreme court's opinion, which will be discussed at greater length in next year's Article, clarified the test for determining reasonableness of law enforcement conduct under section 11 and held that the determination of reasonableness of trash searches is case by case.

229. 788 N.E.2d 862 (Ind. Ct. App. 2003).

road.²³⁰ A police officer dressed as a garbage collector accompanied employees of the private garbage collection company that ordinarily picked up the garbage.²³¹ After they emptied the dumpster (the officer remaining in the garbage truck), they took the garbage off site, where they searched it and found marijuana and items associated with methamphetamine.²³² After further investigation, Mast was charged as a methamphetamine dealer.²³³

The court approved the garbage search, holding that trespass is not the sine qua non of reasonableness.²³⁴ Here, the waste hauling company acted as it always would, coming onto Mast's property to empty the dumpster. Mast only left trash in the dumpster that he intended to abandon. Because police did nothing that the authorized trash collector was not authorized to do, the search was not unreasonable and the evidence did not have to be suppressed.²³⁵

The court in *State v. Neanover*²³⁶ analyzed a search of garbage left outside an apartment on a third-floor, interior landing.²³⁷ The tenants used the landing for a variety of purposes, including storage, and they placed a table and chairs there for recreational use.²³⁸ They sometimes placed their bagged garbage on the landing as an intermediate step before carrying it outside the building for disposal.²³⁹ Police took the bagged garbage from the landing and used its contents, including evidence of marijuana use, as the basis for a search warrant.²⁴⁰

The court of appeals performed a Fourth Amendment analysis, determining that Neanover had a reasonable expectation of privacy in the landing.²⁴¹ She had placed a number of items on the landing that she did not intend to abandon, such as the table and chairs, but she did intend to abandon the garbage.²⁴² The court based its conclusion on the inaccessibility of the third floor landing, Neanover's use of the space as a combination patio and storage space, and the fact that she had not yet taken the garbage to its final resting place.²⁴³

The court also determined that the search was unreasonable under article I, section 11, looking at the totality of circumstances rather than the bright line trespass test of *Stamper*.²⁴⁴ Circumstances the court weighed included the trespass by law enforcement officers as well as the fact that the garbage had not

230. 809 N.E.2d 415 (Ind. Ct. App. 2004), *reh'g denied*, *trans. denied* (Ind. Mar. 24, 2005).

231. *Id.* at 417.

232. *Id.*

233. *Id.* at 418.

234. *Id.* at 420-21.

235. *Id.* at 420.

236. 812 N.E.2d 127 (Ind. Ct. App. 2004).

237. *Id.* at 128.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 130-31.

242. *Id.* at 129-30.

243. *Id.* at 131.

244. *Id.* at 131-32.

been placed in the location where it would be picked up by trash collectors.²⁴⁵

In *Clark v. State*, the defendant argued that his car was searched in violation of the Indiana seatbelt statute.²⁴⁶ He was stopped by a law enforcement officer who had reasonable suspicion that Clark was not wearing a seatbelt.²⁴⁷ The officer then asked Clark for permission to search the car.²⁴⁸ Clark gave permission, and the officer found marijuana.²⁴⁹

The reasonableness analysis in *Clark* hinged on the seat belt statute, which states: "A vehicle may be stopped to determine compliance with this chapter. However, a vehicle, the contents of a vehicle, the driver of a vehicle, or a passenger in a vehicle may not be inspected, searched, or detained solely because of a violation of this chapter."²⁵⁰ The Indiana Supreme Court has interpreted this statute to restrict what police may do when stopping a motorist for a seat belt violation.²⁵¹ The statute is intended to preclude police from using a seat belt stop as a pretext for other actions, including searches, for which they lack any other basis.²⁵²

Under the statutory language, police stopping a motorist for a seatbelt violation have fewer options than if they stop a motorist for other violations. Absent independent evidence of another violation, police may not conduct a search when they have stopped a motorist for a seat belt violation.²⁵³ Because the officer could articulate no additional facts supporting his search, the search results had to be suppressed because law enforcement conduct had been unreasonable under the seat belt statute.²⁵⁴

III. CONSTITUTIONAL AMENDMENTS

Indiana voters ratified three amendments to the Indiana Constitution on November 2, 2004.²⁵⁵

The voters amended article V, section 10 to address the situation when both the governorship and lieutenant governorship are vacant. Under the previous provision, the General Assembly was required to convene within forty-eight hours to select a new governor from the same political party as the former

245. *Id.* at 132.

246. 804 N.E.2d 196 (Ind. Ct. App. 2004).

247. *Id.* at 198.

248. *Id.*

249. *Id.*

250. IND. CODE § 9-19-10-3 (2004).

251. *Baldwin v. Reagan*, 715 N.E.2d 332, 338 (Ind. 1999).

252. *Clark*, 804 N.E.2d at 200.

253. Independent evidence of another violation permits a search. *State v. Morris*, 732 N.E.2d 224 (Ind. Ct. App. 2000).

254. *Clark*, 804 N.E.2d at 201-02.

255. The questions, as they appeared on ballots, and vote totals may be found at <http://www.in.gov/apps/sos/election/general/general2004;jsessionid=aXf-A39uVN78?page=office&countyID=-1&officeID=42&districtID=-1&candidate=> (last updated Jan. 10, 2005).

governor. The new governor could then appoint a new lieutenant governor.²⁵⁶

The added language permits other individuals to discharge the governor's powers and duties during any time period that might elapse before a new governor could be elected.²⁵⁷ It establishes the following order of succession of individuals to exercise the governor's powers and duties until the vacancy is filled: the speaker of the house; the president pro tempore of the senate; the treasurer of state; the auditor of state; the secretary of state; and the state superintendent of public instruction. The provision stipulates that the individual exercising the governor's powers and duties loses authority as soon as the General Assembly has chosen a new governor.

The second amendment enacted by the voters amends article VI, section 2 to permit the General Assembly to provide by law for uniform dates for beginning the terms of county officials including the clerk, auditor, recorder, treasurer, sheriff, coroner, and surveyor.²⁵⁸ This provision addresses a lack of uniformity in terms that has evolved through vacancies in offices.

The third amendment the voters approved changes article X, section 1, which mandates the types of property that must be taxed and the types of property that may be exempted by the General Assembly from property taxation. The constitution previously permitted the General Assembly to exempt personal property from taxation with the exceptions of (1) inventory, (2) personal property used or consumed to produce income, and (3) personal property held as an investment.²⁵⁹ The constitution mandated that these three enumerated classes of personal property had to be taxed.²⁶⁰ The amendment allows the General Assembly to exempt from taxation inventory and personal property used or consumed to produce income.²⁶¹ Personal property held as an investment still

256. The full text of the unamended provision and the amendment appear in Public Laws 188-2002 and 280-2003, the statutes by which two successive sessions of the General Assembly enacted identical amending language, as required by article XVI, section 1. H.J. Res. 2, 112 Gen. Assem., 2d Reg. Sess., 2002 Ind. Acts 188; H.J. Res. 8, 113th Gen. Assem., 1st Reg. Sess., 2003 Ind. Acts 280.

257. *Id.*

258. The full text of the unamended provision and the amendment appear in Public Laws 187-2002 and 279-2003, the statutes by which two successive sessions of the General Assembly enacted identical amending language, as required by article XVI, section 1. S.J. Res. 12, 112th Gen. Assem., 2d Reg. Sess., 2002 Ind. Acts 187; H.J. Res. 7, 113th Gen. Assem., 1st Reg. Sess., 2003 Ind. Acts 279.

259. The full text of the unamended provision and the amendment appear in Public Laws 189-2002 and 278-2003, the statutes by which two successive sessions of the General Assembly enacted identical amending language, as required by article XVI, section 1. H.J. Res. 9, 112th Gen. Assem., 2d Reg. Sess., 2002 Ind. Acts 189; S.J. Res. 5, 113th Gen. Assem., 1st Reg. Sess., 2003 Ind. Acts 278.

260. *Id.*

261. This provision in part retroactively authorized provisions of Act of June 28, 2002, 2002 Ind. Acts 192 (codified at IND. CODE §§ 6-1.1-10-29, 6-1.1-10-29.5; 6-1.1-12-41, 6-1.1-12-42 (2004)), which phased out the inventory tax and other taxes on business personal property.

must be taxed.²⁶²

The amendment also allows the General Assembly to exempt real property used as a principal place of residence by an owner, an owner of a beneficial interest, or a person buying the property on contract.²⁶³

These provisions may be a reaction to the *Town of St. John* litigation,²⁶⁴ which established that all property must be assessed by use of objective information measuring property wealth. When reassessment took place using the *Town of St. John* standard, many homeowners experienced significant property tax increases.²⁶⁵ The constitutional amendment would allow the General Assembly to use its exemption power to protect homeowners from some of the effects of market-value assessments.²⁶⁶

All of these amendments were effective upon approval by the voters.

IV. GUBERNATORIAL SUCCESSION²⁶⁷

A provision of the Indiana Constitution not previously used, article V, section 10, came into play in 2003 upon the unexpected death of Governor Frank O'Bannon. The smooth transition upon Governor O'Bannon's disability and death to the inauguration of Joseph E. Kernan as Indiana's forty-eighth governor since statehood illustrated the capacity of the Indiana Constitution and the good working relationship among the branches of government.

The transition also illustrated the need to interpret article V, section 10 to ensure that someone is always available to exercise gubernatorial powers. Because the interaction of two subsections in section 10 is less than crystal clear, the plain language does not explain precisely how the transition of power occurs in various circumstances.

Governor O'Bannon was the first Indiana governor to die in office in more

262. See *supra* note 259 and accompanying text.

263. *Id.*

264. See, e.g., *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998).

265. See, e.g., Kevin Corcoran, *Voters OK Property Tax Law Changes*, INDIANAPOLIS STAR, Nov. 3, 2004, available at <http://www.indystar.com/articles/8/191562-9438-168.html>.

266. The amendment was enacted by the General Assembly before the Indiana Supreme Court indicated that many "tax policy" decisions such as credits and deductions may be permissible under the "uniform and equal" requirement in article X that undergirded the *Town of St. John* holding. See *Inland Container Corp. v. State Bd. of Tax Comm'rs*, 785 N.E.2d 227 (Ind. 2003) (property tax credit did not implicate "uniform and equal" language, which applies only to assessments, not actual tax bills).

267. The author was counsel to Governor Frank O'Bannon at the time of his disability and death and subsequently became counsel to Governor Joseph E. Kernan. The author thanks Kevin Charles Murray and Richard A. Nussbaum II, special counsels to Kernan when he was lieutenant governor and governor, for their comments on this portion of the article. The author expresses his thanks for the superb colleagueship and friendship of Messrs. Murray and Nussbaum during their period of service in the governor's office, and to Governors O'Bannon and Kernan for providing him an extraordinary opportunity for public service.

than a century,²⁶⁸ and the first since section 10 was amended to its current form in 1978. His death brought sadness to the Indiana Statehouse, where he had worked for decades, and it touched many Hoosiers with sadness as well because they felt a personal connection with him even if they had not met him.²⁶⁹ As Governor Kernan said when he was sworn in, "I've lost my governor and my friend. So too has every Hoosier lost their governor and their friend."²⁷⁰

A. Disability and Succession

Governor O'Bannon had a stroke on September 8, 2003, when he was attending a trade conference in Chicago.²⁷¹ He was unconscious when found that morning, and he remained unconscious throughout his hospitalization until his death on September 13.²⁷² Then-Lieutenant Governor Kernan also was in Chicago and made sure that Governor O'Bannon was properly cared for at a top hospital before returning to Indianapolis.²⁷³

Upon his return to Indianapolis, Lieutenant Governor Kernan stated publicly that he had assumed the responsibility of acting governor as provided by the constitution. In assuming authority as acting governor, Kernan quoted subsection (a) of section 10, which states, "[i]n case the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall discharge the powers and duties of the office as Acting Governor."²⁷⁴

268. The last Indiana governor to die in office was Alvin P. Hovey in 1891, well before the current version of article V, section 10 was in effect. Indiana Historical Bureau, *Indiana Governor Alvin Peterson Hovey*, at <http://www.statelib.lib.in.us/www/ihb/govportraits/hovey.html> (last visited Mar. 19, 2005). The last lieutenant governor to assume the governorship was Emmett Branch, who became governor in 1924 when Warren T. McCray resigned after being convicted of mail fraud. 2 JOHN D. BARNHART & DONALD F. CARMONY, *INDIANA FROM FRONTIER TO INDUSTRIAL COMMONWEALTH* 392-93 (1954).

269. See, e.g., Monica Davey, *With Respect, a State Pauses (Even Its Politicians)*, N.Y. TIMES, Sept. 21, 2003, at A27.

270. IND. GEN. ASSEMBLY, REPORT ON GUBERNATORIAL SUCCESSION AND MEMORIALS TO GOV. FRANK L. O'BANNON, at Senate 5, House 7 (2003) [hereinafter REPORT ON O'BANNON SUCCESSION] (remarks of Gov. Joseph E. Kernan).

271. Mary B. Schneider, *O'Bannon Gravely Ill After Massive Stroke*, INDIANAPOLIS STAR, Sept. 9, 2003, at A-1; J.K. Wall, *Governor Met with Japanese Business Leaders*, INDIANAPOLIS STAR, Sept. 9, 2003, at A10.

272. Diana Penner & Kristina Buchthal, *Doctors Say Damage Was Too Great*, INDIANAPOLIS STAR, Sept. 14, 2003, at A9.

273. Schneider, *supra* note 271, at A1; Michele M. Solida, *State Leaders Ready to Act if Necessary*, INDIANAPOLIS STAR, Sept. 9, 2003, at A1.

274. IND. CONST. art. V, § 10(a); Press Release, Indiana Office of the Governor, Statement About Governor O'Bannon's Condition; Kernan Is Acting Governor (Sept. 8, 2003) (available at Indiana State Archives). Section 10 was amended by the voters effective November 2, 2004. See *supra* notes 256-57 and accompanying text. The constitutional language in effect when Governor Kernan succeeded to the governorship in 2003 was affected by this amendment, but not in

But subsection (d) of section 10 also speaks to the transfer of power to the acting governor in the case of a governor's disability. It requires the president pro tempore of the state senate and speaker of the state house of representatives to "file with the supreme court a written statement suggesting that the Governor is unable to discharge the powers and duties of the office."²⁷⁵ The supreme court then must meet within forty-eight hours to decide whether the governor is able to serve; if it decides the governor is not, the lieutenant governor assumes the governor's duties as acting governor.

Leaders of the legislative branch acted under subsection (d) two days after Governor O'Bannon was hospitalized. On September 10, the president pro tempore and the speaker initiated the formal process under subsection (d).²⁷⁶ Shortly after the legislative leaders filed their petition, the supreme court issued an order finding Governor O'Bannon unable to discharge his duties because of his health condition and stating that "the Lieutenant Governor, Joseph E. Kernan, shall discharge the powers and duties of the office of Governor as Acting Governor in addition to serving as Lieutenant Governor."²⁷⁷ The court's order also "ratified" actions Kernan had taken since Governor O'Bannon's disability was discovered at 9:30 a.m. on September 8, 2003.²⁷⁸

The branches of state government cooperated closely during this time. The speaker and president pro tempore were in frequent contact with the lieutenant governor's office and the governor's office.²⁷⁹ The supreme court was well aware of events as they transpired.²⁸⁰ Because of this coordination and communication, the supreme court already was convened in its conference room awaiting delivery of the letter from speaker and president pro tempore on September 10.²⁸¹

The record shows sensitivity on the part of the legislative and judicial branches to the issues of succession. Before they delivered their letter to the supreme court, the president pro tempore and speaker sought not only a letter from Governor O'Bannon's treating physician stating that he could not discharge his duties, but also a letter indicating that the O'Bannon family supported designation of Kernan as acting governor.²⁸² This sensitivity in part reflected the close personal relationships among the principals involved, but also showed the principals' desire not to insert themselves unnecessarily into the operation of the

substance. The relevant language discussed and analyzed in this portion of the Article was only made gender-neutral, not changed substantively. This Article quotes the current constitutional language.

275. IND. CONST. art. V, § 10(d).

276. REPORT ON O'BANNON SUCCESSION, *supra* note 270, at Senate 3, House 5.

277. *Id.* at Senate 4, House 6.

278. *Id.*

279. *Id.* at Senate 2, House 4 ("Our attorneys met numerous times with the attorneys from the Governor's and Lieutenant Governor's Offices.").

280. David J. Remondini, *Executive Power Transfer Affects Supreme Court*, IND. LAW., Oct. 8-21, 2003, at 5.

281. *Id.*

282. REPORT ON O'BANNON SUCCESSION, *supra* note 270, at Senate 3-4, House 5-6.

other branch out of respect for the distribution of powers set forth in article III of the Indiana Constitution.

B. Interpretation of Section 10

The question left unanswered by the transition of power in 2003 is how subsection (a)—which appears to automatically vest the authority of acting governor in the lieutenant governor when the governor is disabled—is reconciled with subsection (d), under which the other two branches must act in concert to give the lieutenant governor authority as acting governor.²⁸³ Between the time Governor O'Bannon became disabled on September 8 and the supreme court's order on September 10, Kernan performed as acting governor under subsection (a) even though there had been no formal action by the other branches under subsection (d). How to interpret section 10 should be determined in light of the text, the history of the time when the provision was adopted, the structure and function of the constitution, and relevant case law.²⁸⁴ Lieutenant Governor Kernan also stated that he took on the responsibilities as acting governor under a "common sense" interpretation of the language,²⁸⁵ a phrase the Indiana Supreme Court used two months later in a different context, stating that "common sense has driven our constitution from the earliest time."²⁸⁶

1. *Text.*—The plain language of subsection (a) reads as if the lieutenant governor becomes acting governor automatically—without intervention by the other branches—when the governor is unable to discharge the powers and duties of his office. The words of the provision, read in the most straightforward manner, invest the lieutenant Governor in the role of acting governor automatically.

The structure of the second sentence of subsection (a) parallels the structure of the first sentence of subsection (a): "In case the Governor-elect fails to assume office, or in case of the death or resignation of the Governor or the Governor's removal from office, the Lieutenant Governor shall become Governor and hold office for the unexpired term of the person whom Lieutenant Governor succeeds."²⁸⁷ Both sentences describe situations in which the lieutenant governor

283. The legislative leadership in office at the time plainly believed that the lieutenant governor could be made acting governor only under the provisions of subsection (d). REPORT ON O'BANNON SUCCESSION, *supra* note 270, at Senate 2, House 4. In their statement on succession, the legislative leaders indicated that "[t]here was no dispute" among the branches that only action by the legislative leadership and supreme court could transfer power. *Id.* The inaccuracy of that statement is shown by Lt. Governor Kernan's statement on September 8, 2003 that he "assume[d] the duties" of Acting Governor "under what he called 'a common sense provision' of the Indiana Constitution," quoting subsection (a) as making him Acting Governor upon the Governor's disability.

284. See, e.g., *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

285. Press Release, *supra* note 274.

286. *D & M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 901 (Ind. 2003).

287. IND. CONST. art. V, § 10(a).

assumes the powers of the governorship without any intervening action by other branches. In the first sentence, if the governor-elect fails to take the oath or the governor dies, resigns, or is removed, the lieutenant governor “shall become Governor.” Similarly, the second sentence states straightforwardly that if the governor “is unable to discharge the powers and duties of the office,” the lieutenant governor shall discharge those powers and duties as acting governor. Both sentences of subsection (a) describe a direct transfer of authority without intervention by other branches.

Subsection (d), on the other hand, states that the lieutenant governor becomes acting governor when the other two branches act to confirm the governor’s disability.²⁸⁸ It requires, first, that the leaders of the two legislative branches unanimously ask the supreme court for a declaration of the governor’s disability, then, second, that the court confirm that the governor is unable to discharge the powers and duties of his office. It makes no reference to the automatic succession language of subsection (a).

The balance of section 10, not directly applicable in the 2003 succession, may also shed light on the meaning of the section. Subsection (b) provides the method for filling the lieutenant governorship in the event the lieutenant governor succeeds to the governorship.²⁸⁹ It also allows the Indiana General Assembly, by statute, to designate a means for filling the lieutenant governorship temporarily if the lieutenant governor is disabled or cannot serve.²⁹⁰ Subsection (c) provides a means for the governor himself to relinquish power temporarily in the event he recognizes his own disability or anticipates a period of time (such as anesthesia during surgery) when he will be unable to fulfill the duties of his office.²⁹¹ The governor takes this action by transmitting a written statement to legislative leaders declaring his disability; he may resume office upon transmitting a written statement stating that he is able to act as governor once again. Subsection (e) directs the General Assembly to convene, in the event that the governorship and lieutenant governorship are vacant simultaneously, to select a new governor, who would then select a new lieutenant governor under the provisions of subsection (b).²⁹²

2. *History.*—Indiana lacks legislative history, but the legislative committee that drafted the current language of section 10 prepared a brief report explaining the reasoning behind the amendment. The prior language of section 10 permitted the lieutenant governor to become acting governor upon the governor’s disability, but “[s]ince no method is provided to determine when the contingency [of disability] exists, it is unlikely that it would ever be effected.”²⁹³ The portions of

288. IND. CONST. art. V, § 10(d).

289. IND. CONST. art. V, § 10(b).

290. See IND. CODE § 4-4-2-2 (2004).

291. IND. CONST. art. V, § 10(c).

292. IND. CONST. art. V, § 10(e). The amendment ratified by the voters in 2004 lists additional individuals who are to exercise the powers and duties of the governor in the event that both the governorship and lieutenant governorship are vacant. See *supra* note 255 and accompanying text.

293. IND. LEGISLATIVE COUNCIL, REPORT OF THE COMM. ON GUBERNATORIAL SUCCESSION

section 10 relating to gubernatorial disability were added to address that problem.

The committee's report also explains its unanimous understanding of the operation of the amendment it proposed, which became the current version of section 10:

In case the Governor is unable to discharge the duties of his office, the Lieutenant Governor becomes acting Governor.

- (a) The Governor may declare in writing to the President Pro Tempore of the Senate and to the Speaker of the House that he is unable to discharge his duties; and he may reassume his duties by declaring in writing to the President Pro Tempore of the Senate and the Speaker of the House that he is able to discharge his duties.
- (b) The Supreme Court may, pursuant to a proceeding initiated by either the President Pro Tempore of the Senate or the Speaker of the House[,] determine that the Governor is unable to discharge his duties; and, later, pursuant to a proceeding initiated by the Governor determine that the Governor is able to discharge his duties.²⁹⁴

The 1978 amendment of section 10 also occurred shortly after the 1967 enactment of the Twenty-Fifth Amendment to the United States Constitution, which created a similar system for filling the presidency when the President is temporarily unable to act. The framers of Indiana's amendment were clearly aware of the federal change, as they appended material relating to the federal change to their committee report.²⁹⁵ A primary motivation for the Twenty-Fifth Amendment was to provide for filling the vice-presidency after the vice-president acceded to the presidency, a contingency not then addressed in the Constitution.²⁹⁶ The Twenty-Fifth Amendment also addressed the temporary disability of the President—which had occurred in the recent past when President Eisenhower was sedated for surgery. A President alert at all times and able to deal with pressing issues of national defense was considered a necessity during those Cold War years.²⁹⁷

But the federal amendment took a different approach than section 10, and its history is therefore of limited use. Under the federal provision, the Vice President or a majority of cabinet members can ask Congress to declare that the president is disabled, and the vice president takes on presidential responsibilities immediately upon filing the declaration.²⁹⁸ The President can resume his duties

3 (Oct. 1974).

294. *Id.* at 6.

295. *Id.* at 9-11.

296. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 6 (1968). Bayh, then senator from Indiana, authored the Twenty-Fifth Amendment and shepherded it through Congress.

297. *Id.* at 23-26. Woodrow Wilson had an even more severe disability during his second term in office, and his wife and aides exercised significant presidential authority at that time. *Id.* at 19-21.

298. U.S. CONST. amend. XXV, § 4, para. 1.

by filing a written statement that he is no longer disabled. If the Vice President or a majority of the cabinet state in writing that the disability has not ceased, the factual issue is decided by a congressional vote. Indiana's approach is different, in that no one in the Executive Branch is involved in the decision to recognize and adjudicate gubernatorial disability.²⁹⁹

3. *Structure and Function.*—As a functional matter, section 10 balances two competing ideas. First, it is important to have orderly and prompt succession in the event of gubernatorial disability. Second, it is vital to protect the democratic process against usurpation of gubernatorial authority by a lieutenant governor when the governor is in fact able to serve. section 10, like the Twenty-Fifth Amendment, puts arrangements in place to balance those competing ideas.

The question whether the lieutenant governor becomes acting governor automatically under subsection (a) in the event of the governor's disability could be particularly important if there is immediate need for gubernatorial action. One can imagine a number of scenarios in which quick action by an acting governor would be necessary in the event of a governor's disability. The most obvious, if least pleasant, is if the governor's disability were caused by a criminal or terrorist act or natural disaster that also disabled other portions of the government. If no quorum of the supreme court could be assembled, or if the legislative leaders could not communicate with one another for reasons that could arise from a disaster or terrorist attack, the provisions of subsection (d) could not be used to promptly install an acting governor.

The need for prompt succession is important not only in the event of a potential disaster or threat, but also to accomplish more quotidian activities of government. Someone needs to perform gubernatorial duties ranging from signing documents necessary for public finance transactions to approving agency rules, many of which involve deadlines for gubernatorial action.³⁰⁰ Moreover, if a gubernatorial disability were to occur during a legislative session, a gap in authority could lead to effective forfeiture of the veto power because of non-extendable deadlines.³⁰¹

On the other hand, structures must be in place to ensure that a lieutenant governor does not improperly usurp the role of acting governor. Subsection (d) sets a high barrier for someone wishing to take on or maintain the acting governor role. Significant figures from the other branches, including a majority of the justices of the supreme court, must concur in the transfer of power. This mechanism makes usurpation very difficult.

4. *Cases.*—No cases interpret this portion of the Indiana Constitution.

299. Indiana is considered to have a "weak governor" government in that, for example, the gubernatorial veto can be overridden by a simple majority. IND. CONST. art. V, § 14. The assignment of determining gubernatorial disability to the legislative and judicial branches, without any involvement by the executive branch, is another example of this pattern.

300. See, e.g., IND. CODE § 4-22-2-34 (proposed rule becomes law without signature if governor fails to act by fifteenth day).

301. IND. CONST. art. V, § 14 (governor must veto bill within seven days of delivery or it becomes law without signature).

C. Analysis

The key to interpreting section 10 is to give meaning to both subsection (a) and subsection (d). Principles of construction indicate that each subsection should be read to have meaning if at all possible.³⁰² Reading subsection (d) as the only method for installing the lieutenant governor as acting governor when the governor is disabled would render the second sentence of subsection (a) meaningless. But if the lieutenant governor becomes acting governor automatically upon the governor's disability, what is the purpose for subsection (d)?

Examining the various situations in which succession could take place in the event of gubernatorial disability permits both subsections to have meaning. The circumstances that could occur are the following:

1. The governor could become disabled in a situation in which the disability is clear and unquestionable, as when Governor O'Bannon became ill;
2. The governor could become disabled but be unable or unwilling to detect or admit his disability;
3. The governor's ability to discharge the duties of his or her office could be questionable;
4. The lieutenant governor could seek to become acting governor when the governor is not unable to exercise the duties and responsibilities of the governorship.

In the first instance, there is no problem with the lieutenant governor's automatic succession to the acting governorship. When the governor's disability is clear, there is no question that the governor cannot perform his or her duties, nor is there any question of usurpation of gubernatorial functions by the lieutenant governor. In this instance, the automatic succession language of subsection (a) can operate without violating the intent of the framers of section 10 and without offending the structural and functional considerations that animate section 10. While the lieutenant governor can become acting governor automatically and immediately under the language in subsection (a), it still may be appropriate, in due time, for the other branches to express their assent through the procedure in subsection (d).

In the second circumstance, there must be a procedure to formally declare the governor unable to perform the functions of his or her office. If the governor is unable to properly perform his or her duties, there must be a method to formally determine his or her disability. Subsection (d) provides that process. The leaders of the legislative branch must call the governor's disability to the attention of the

302. *E.g.*, *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002) (meaning to be taken from whole provision, not one portion read in isolation); *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning Inc.*, 746 N.E.2d 941 (Ind. 2001) (no portion of a law should be rendered meaningless by construction) (both statutory construction cases).

supreme court, which adjudicates the disability and gives the lieutenant governor power as acting governor. This process provides for an orderly (although not necessarily prompt) succession, and it avoids any question of usurpation of gubernatorial authority by the lieutenant governor.

The third situation is similar to the second. When there is a question about the governor's ability to serve, there must be a procedure for determining his competency. Subsection (d) sets up that procedure, allowing the legislative leadership to present the matter to the supreme court, which would determine the factual issue of competency. This process allows orderly succession with no hint of usurpation. As in the second circumstance, the only problem with using subsection (d) when the governor's competency is questionable is the time it could take to initiate and conduct the process. The cognate federal provision addresses this possibility by giving the Vice President immediate power whenever the Vice President or a majority of cabinet members provides a written declaration of the President's disability.³⁰³ If the President's capacity must be adjudicated, a timetable is provided for Congress to do so.³⁰⁴

Indiana has taken a different approach, creating a system under which precluding potential usurpation takes precedence over speedy transition of power when the governor's disability is doubtful. By leaving the governor in full control until his disability is determined under subsection (d), Indiana's system ensures that the governor will retain complete authority until the process for determining his disability runs its entire course. This provision represents a decision by the framers and ratifiers that legitimacy and process are more important than speed in the transfer of power in the event of a potential gubernatorial disability.

The fourth possibility, that the lieutenant governor could seek power even when the governor is not disabled, is not addressed directly by any provision of section 10. If a lieutenant governor were to announce that the governor is unable to fulfill his responsibilities so, as lieutenant governor, he was assuming authority as acting governor, several possibilities could ensue if the governor was not in fact disabled. The governor could use the provisions of subsection (c) by submitting a written statement to the president pro tempore and speaker stating that he is not disabled, permitting him to "resume the powers and duties of his office" automatically, without further action by any other branch. But this provision may be restricted to situations in which the governor himself has previously declared his disability in writing. He could use the similar provision of subsection (d) permitting him to file a written declaration of ability to serve and requiring the supreme court to rule within 48 hours whether his disability has ceased. But similarly, this provision may be limited to circumstances in which the supreme court has previously adjudicated the governor's inability to serve. The governor—alone or in conjunction with the legislative leadership—could choose another legal avenue, such as seeking an injunction, to restore his authority.

303. U.S. CONST. amend. XXV, § 4.

304. *Id.*

Subsection (a) can be used for prompt transfer of authority in circumstances such as those that occurred in 2003, when Governor O'Bannon's disability was clear from the outset. Allowing transfer of authority to the lieutenant governor as acting governor in those circumstances gives vitality to subsection (a), which might otherwise be a dead letter. It allows the second sentence of subsection (a) ("In case the Governor is unable to discharge the powers and duties of the office, the Lieutenant Governor shall discharge the powers and duties of the office as Acting Governor.") to function in exactly the same manner as the first sentence of subsection (a) ("In case the Governor-elect fails to assume office, or in case of the death or resignation of the Governor or the Governor's removal from office, the Lieutenant Governor shall become Governor and hold office for the unexpired term of the person whom he succeeds."). In both cases, the lieutenant governor assumes gubernatorial duties automatically upon the occurrence of an obvious event—a governor's death, resignation, removal, or clear disability.

Subsection (a) has the obvious advantage of speed. It permits immediate transfer of power in circumstances where haste may be vital. Indiana's legislature and voters underlined the importance of succession in a post-9/11 world by enacting a constitutional amendment in 2004 clarifying gubernatorial succession and designating an order of succession if both the governor and lieutenant governor are unable to serve.³⁰⁵ Section 10 also provides a counterweight to that speed through its procedures for settling disputes about gubernatorial disability in the event of overreaching by a lieutenant governor.

305. See *supra* note 257 and accompanying text.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

Indiana's appellate courts tackled many significant issues during the survey period October 1, 2003, to September 30, 2004. Although many opinions addressed the standard fare of such issues as search and seizure law and sentence review, others entered uncharted territory, at least partially in response to two landmark United States Supreme Court decisions issued in 2004.¹ This Article seeks not only to summarize the significant opinions of the past year but also to offer some perspective on their likely future impact.

I. SEARCH & SEIZURE

Several cases during the survey period addressed challenges to searches and seizures, either under the Fourth Amendment or Indiana's nebulous analog, article I, section 11 of the Indiana Constitution. Since Chief Justice Shepard's 1989 article² encouraged the bar to revivify the Indiana Constitution, individual rights have not been widely or deeply expanded beyond the protections of the United States Constitution.³ Because of the intensely fact-centered nature of claims regarding unreasonable searches and seizures—and the broadly worded standard that looks only to whether police conduct was reasonable,⁴ many claims under section 11 are brought and, not infrequently, succeed.

Bringing claims under both constitutions is usually of critical importance to defendants. However, the court of appeals' affirmance of the grant of a motion to suppress in *State v. Hanley*⁵ brought the point home to the State as well. There, the defendant challenged a search based on both the Fourth Amendment and section 11, and the trial court granted the motion based on the latter.⁶ Oddly, though, the State limited its appeal to the Fourth Amendment issue, saying nothing of section 11.⁷ Reiterating that the Fourth Amendment provides only the "minimum amount of protection a state may provide for its citizens," the court found the State had not met its burden under the separate analysis of the Indiana

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1. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

2. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

3. See Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961 (2003).

4. See generally *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999); *Brown v. State*, 653 N.E.2d 77, 78 (Ind. 1995).

5. 802 N.E.2d 956 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 802 (Ind. 2004).

6. *Id.* at 957-58.

7. *Id.* at 958.

Constitution to show that the intrusion was reasonable.⁸

A. Indiana Supreme Court Cases

In *State v. Bulington*,⁹ the defendant moved to suppress evidence in the trial court based on both the Fourth Amendment and section 11, but the Indiana Supreme Court addressed only the section 11 claim because it entitled him to relief.¹⁰ The methamphetamine scourge in Indiana apparently led Lafayette police to convince Meijer employees to report any customers who purchased more than three boxes of cold medicine, which is a methamphetamine precursor.¹¹ Bulington entered the store with another man and each picked up three boxes of antihistamines at separate checkout counters.¹² Store camera showed the men unite in the same truck in the parking lot, where they emptied the boxes of pills into Meijer bags.¹³ Police were called and stopped Bulington's vehicle as it was pulling out of the parking lot.¹⁴ Bulington gave his consent to search, and police found hundreds of loose pills and other items commonly used to manufacture methamphetamine.¹⁵ The trial court granted Bulington's motion to suppress, holding the traffic stop improper and that consent to search was not voluntarily given.¹⁶ The court of appeals reversed in a 2-1 decision.¹⁷ In an unusual vote alignment, the Indiana Supreme Court granted transfer and affirmed the trial court.¹⁸

Justice Sullivan, writing for Justices Dickson and Rucker, reviewed recent decisions concerning pretextual stops,¹⁹ stops to ensure seatbelt compliance,²⁰ and sobriety checkpoints,²¹ before concluding "where there is no reason to believe a violation of law has occurred or is occurring, a traffic stop is reasonable only if designed and implemented on neutral criteria that safely and effectively targets a serious danger specific to vehicular operation."²² Placing a high premium on the protection of the "private areas" of Hoosiers' lives and out of a

8. *Id.* at 958-59.

9. 802 N.E.2d 435 (Ind. 2004).

10. *Id.* at 438. This certainly creates a certiorari-proof decision but differs from other search and seizure cases in which the court appeared somewhat reticent to resolve matters under the state constitution. See, e.g., *Middleton v. State*, 714 N.E.2d 1099 (Ind. 1999).

11. *Bulington*, 802 N.E.2d at 436.

12. *Id.*

13. *Id.*

14. *Id.* at 437.

15. *Id.*

16. *Id.*

17. *State v. Bulington*, 783 N.E.2d 338 (Ind. Ct. App. 2003).

18. *Bulington*, 802 N.E.2d at 437.

19. See *Mitchell v. State*, 745 N.E.2d 775 (Ind. 2001).

20. See *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999).

21. See *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002).

22. *Bulington*, 802 N.E.2d at 439.

concern for “official arbitrariness, discretion, and discrimination” by police, the majority held the stop invalid under section 11.²³ Nevertheless, reviewing precedent from other states, the court suggested that stops are supported by reasonable suspicion under the Fourth Amendment if a customer “(1) purchases a combination of methamphetamine precursors from one store; (2) purchases a combination of precursors from several stores; (3) purchases of [sic] one precursor and then commits a traffic violation warranting a traffic stop; and (4) purchases one precursor and the arresting officer has knowledge of defendant’s previous involvement with methamphetamine.”²⁴ Presumably, any of these four scenarios would suffice under section 11 scrutiny as well.²⁵

Justice Boehm, joined by Chief Justice Shepard, dissented.²⁶ Recounting that the men lingered in the cold remedy aisle, purchased the maximum number of packages a store may sell to an individual, checked out individually, and then emptied the boxes into bags of loose pills, Justice Boehm concluded: “I can think of nothing these actions suggest except preparation to cook these pills into some broth. It seems to me that the police had a moral certainty, not just reasonable suspicion, that they had some unregulated pharmaceutical manufacturers on their hands.”²⁷

Although the *de novo* standard of review²⁸ entitles each justice to his own view of the facts, the future value of *Bulington* lays not so much in the fact-sensitive consideration of reasonable suspicion but its broader concerns espoused in the majority opinion. In response to *Bulington*, one could hope that law enforcement would design policies that minimize the potential for traffic stops based on arbitrary and discriminatory motives. This would certainly set section 11 apart from prevailing Fourth Amendment jurisprudence and seemingly offer Hoosiers additional protection in areas of life commonly regarded as private.

In *Finger v. State*,²⁹ the Indiana Supreme Court again addressed detention and reasonable suspicion for a vehicle stop.³⁰ There, a police officer pulled behind a vehicle that was partially stopped in the driving lane.³¹ Although the driver reported he was out of fuel, the officer observed that the gas gauge showed one-eighth of a tank and knew a gas station was less than two blocks away.³² Merely stopping behind a vehicle or questioning a driver is not detention under the Fourth Amendment,³³ but the stop was transformed from a consensual encounter into an investigatory stop once the officer retained Finger’s license for

23. *Id.* at 440.

24. *Id.* at 441 (footnotes omitted).

25. *See id.* at 441-42.

26. *Id.* at 442 (Boehm, J., dissenting).

27. *Id.*

28. *See id.* at 438, 442.

29. 799 N.E.2d 528 (Ind. 2003).

30. *Id.* at 533.

31. *Id.* at 530.

32. *Id.* at 530-31.

33. *Id.* at 533.

several minutes.³⁴

Turning to the issue of reasonable suspicion, the court recounted the facts relied on by the officer: (1) the car was reported as a "suspicious" vehicle; (2) Finger's statement that the vehicle was out of fuel was inconsistent with the gas gauge and the close proximity of a gas station; (3) Finger told other inconsistent stories to the officer; (4) the officer observed a folded pocketknife in the vehicle; and (5) Finger and his passenger were "acting nervous."³⁵ The court placed little emphasis on the first and fifth factor because a "report that describes a suspicious car, but gives no further information, is insufficient to create reasonable suspicion"³⁶ and "it is common for most people 'to exhibit signs of nervousness when confronted by a law enforcement officer' whether or not the person is currently engaged in criminal activity."³⁷ The detention was upheld based on the other factors, specifically the "implausible explanation" of the vehicle's occupants and the subsequent report of a robbery in the immediate vicinity.³⁸

Justice Rucker dissented in *Finger*, based largely on his view of the timing of the relevant facts.³⁹ In his view, at the time of detention the officer knew only that Finger had lied about being out of gas and had seen the folded pocketknife, which is not contraband.⁴⁰ A deceptive response, standing alone, does not give rise to reasonable suspicion.⁴¹

Coupled with his vote in *Bulington*, Justice Rucker, the court's newest member, may be emerging as the staunchest supporter of individual rights against police activity. The opinion in *Finger*, however, seems largely limited to its facts and could be fodder for either side in later cases involving reasonable suspicion.

B. Indiana Court of Appeals Cases

The court of appeals issued several opinions addressing search and seizure issues. The old adage, "when it rains, it pours," seems especially true in the realm of searches of garbage, as the issue arose in several cases during the survey period. The grant of transfer in one of those cases, however, suggests that resolution will not come until next year.

The garbage search saga began with *State v. Stamper*,⁴² where a panel of the court of appeals held that a warrantless search of trash that was not placed for collection and was obtained by trespassing on the defendant's property violated article I, section 11 of the Indiana Constitution. Several months later, in

34. *Id.*

35. *Id.* at 534.

36. *Id.* (citing *United States v. Packer*, 15 F.3d 654, 659 (7th Cir. 1994)).

37. *Id.* (quoting *United States v. Salzano*, 158 F.3d 1107 (10th Cir. 1998) (quoting *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997))).

38. *Id.* at 535.

39. *Id.* at 537 (Rucker, J., dissenting).

40. *Id.*

41. *Id.*

42. 788 N.E.2d 862 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 747 (Ind. 2003).

Litchfield v. State,⁴³ a different panel “decline[d] to follow” that case, reasoning that the earlier opinion had improperly created a bright-line test by forbidding any entry onto private property—regardless of “how many feet the officer had to traverse to reach the garbage bag.”⁴⁴ Instead, the court relied on *Moran v. State*,⁴⁵ which had upheld a curbside warrantless search of trash that (1) was reached without trespassing on the defendant’s property, (2) was performed at a time when neighbors would not be disturbed, and (3) was performed in a manner consistent with typical trash collection.⁴⁶ In upholding the search in *Litchfield*, the majority acknowledged that the police officer had trespassed onto the defendants’ property but did so in a manner consistent with their regular trash collection and at times when his activities would not draw the neighbor’s attention.⁴⁷ Finally, the trash containers were more than fifty yards from the residence in an unfenced area that was not part of the curtilage.⁴⁸

Judge Riley dissented, relying heavily on *Stamper*, a case in which the supreme court had denied transfer.⁴⁹ In her view, the police officer’s trespass onto the defendants’ property resolved the issue because the officer violated the defendants’ reasonable expectation of privacy. Moreover, she faulted the majority for making a distinction based on curtilage, which she characterized as a “sweeping change to, and . . . an unnecessary deterioration of, our supreme court’s liberal interpretation of Article I, [section 11] of the Indiana Constitution.”⁵⁰

In *State v. Neanover*,⁵¹ the State appealed the grant of a motion to suppress the warrantless search and seizure of garbage. The garbage had been placed just outside the door of the defendant’s apartment, which was one of only two apartments on the top floor of a three-story apartment building. The court of appeals found the seizure to violate the Fourth Amendment because Neanover had a reasonable expectation of privacy in the trash.⁵² It was left in a low-traffic area that was used as a patio/storage area, which few would access.⁵³

The court also found the seizure to violate article I, section 11 of the Indiana Constitution and its reasonableness “under the totality of the circumstances” standard.⁵⁴ Reviewing recent decisions on garbage searches, the court emphasized the propriety of seizing trash left in the regular location for collection, the eschewing of a bright-line rule barring entry onto private property,

43. 808 N.E.2d 713 (Ind. Ct. App. 2004), *vacated on transfer by* 824 N.E.2d 356 (Ind. 2005).

44. *Id.* at 716 (quoting *Stamper*, 788 N.E.2d at 866 n.2).

45. 644 N.E.2d 536 (Ind. 1994).

46. *Litchfield*, 808 N.E.2d at 716.

47. *Id.*

48. *Id.*

49. *Id.* at 717 (Riley, J., dissenting).

50. *Id.* at 718.

51. 812 N.E.2d 127 (Ind. Ct. App. 2004).

52. *Id.* at 130-31.

53. *Id.* at 131.

54. *Id.*

and the general preference for a warrant absent exigent circumstances.⁵⁵ The court noted that “by walking up to the landing empty-handed and coming back down with Neanover’s garbage, the officer did something even the trash collection service was not authorized to do.”⁵⁶ Echoing language similar to its Fourth Amendment analysis, the court concluded that the officers had stepped into an area in which the defendant had “manifested an expectation of privacy akin to what a homeowner feels in his house and curtilage, a zone of privacy.”⁵⁷

The *Neanover* panel squared its decision with *Litchfield*, a case in which a divided panel upheld the seizure of garbage taken from private property “in a manner consistent with the [defendants’] regular trash collection service and at times [of the day] that would not bring [the] police activities to the neighbors’ attention.”⁵⁸

Finally, in *Lovell v. State*,⁵⁹ police smelled a strong odor of ether when they went to a home, but no one answered the door when police knocked. After observing the house from a nearby parking lot, police saw four people leave the home, and police then retrieved three garbage bags that had been placed by the mailbox.⁶⁰ The court of appeals upheld the constitutionality of the search under the reasonableness standard of section 11, noting that other homes had garbage bags in a similar location, which suggested the bags had been placed for trash pickup.⁶¹ Moreover, the trash bags were seized by police in the same way that garbage collectors would have taken them and without trespassing on the property.⁶²

Although common themes appear, these cases are difficult to reconcile. Transfer was denied in *Stamper* and *Lovell* and not sought in *Neanover*. Transfer was granted in *Litchfield*, suggesting guidance on the horizon on this old issue of strangely newfound interest. The supreme court will likely rely heavily on its own precedent in *Moran*, which upheld a search of garbage but expressed concern that “Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside.”⁶³ The concern for the reasonableness of police conduct is not grounded solely in where the trash is located but in the reasonable suspicion for which police seek the trash. The concern for arbitrary and discriminatory police activity noted in *Bulington*⁶⁴ may therefore resurface in crafting a response to police searches of garbage.

The court of appeals held in *Denton v. State*,⁶⁵ that a vehicle’s broken rear

55. *Id.* at 132.

56. *Id.*

57. *Id.* at 133.

58. *Id.* at 132-33 (quoting *Litchfield*, 808 N.E.2d at 716) (alterations in original).

59. 813 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 976 (Ind. 2004).

60. *Id.* at 395.

61. *Id.* at 398.

62. *Id.*

63. *Moran*, 644 N.E.2d at 541.

64. *See supra* notes 10-28 and accompanying text.

65. 805 N.E.2d 852 (Ind. Ct. App. 2004).

window does not, standing alone, create reasonable suspicion to stop the vehicle.⁶⁶ The prevailing view in other states permits such stops,⁶⁷ but the *Denton* panel expressed concern at the prospect of allowing police to stop “any car at all with a broken window.”⁶⁸ Windows can be broken accidentally, and although deference is given to an officer’s training and experience, the officer who stopped *Denton* said nothing to suggest an assessment that the vehicle had been stolen based on the particular broken window at issue.⁶⁹ Because the stop was based “upon nothing more than unparticularized suspicion,” the motion to suppress should have been granted.⁷⁰

Finally, the court of appeals seemingly broke new ground in chastising and sanctioning police for apparently encouraging illegal behavior to effect their desired ends. One can usually glean quite a bit from the way the court frames an issue in the first sentence of its opinion. When the issue is framed as “whether a police officer may encourage a person on home detention to speed through an inhabited area while under the influence of alcohol and drugs in order to effectuate a pretextual stop to allow them to detain and search the occupants of the vehicle,”⁷¹ the word “reversed” is almost certain to follow. Indeed, in *Osborne v. State*, the court of appeals held as an issue of first impression that the exclusionary rule applies not only to illegal conduct but also to the “outrageously dangerous conduct” that police encouraged in that case.⁷² The court grounded its decision in article I, section 11 and therefore found it unnecessary to address the Fourth Amendment claim.⁷³ Finally, the court found, as the State had conceded at oral argument, that a passenger had standing to challenge a traffic stop, disagreeing with two earlier decisions.⁷⁴

II. INSANITY DEFENSE

The appellate courts tackled two issues related to the insanity defense in the survey period: (1) procedural issues regarding calling a defense expert on insanity if the defendant did not cooperate with the court-appointed experts and (2) the substantive issue of the quantum of proof necessary to uphold a factfinder’s rejection of the insanity defense on appeal.

In *Berryman v. State*,⁷⁵ the State appealed two reserved questions of law after

66. *Id.* at 853.

67. *See id.* at 856 n.3 (collecting cases).

68. *Id.* at 856.

69. *Id.*

70. *Id.*

71. *Osborne v. State*, 805 N.E.2d 435, 437 (Ind. Ct. App. 2004).

72. *Id.* at 440.

73. *Id.* at 441.

74. *Id.* at 439 (citing *Porter v. State*, 570 N.E.2d 1324, 1325 (Ind. Ct. App. 1991); *Groff v. State*, 415 N.E.2d 721, 726 n.8 (Ind. Ct. App. 1981)).

75. 796 N.E.2d 741 (Ind. Ct. App. 2003), *aff’d as modified on trans.*, 801 N.E.2d 170 (Ind. 2004).

a defendant was found not responsible by reason of insanity in his murder trial.⁷⁶ When a defendant files a notice to pursue an insanity defense, the trial court must appoint two or three competent disinterested psychiatrists or psychologists to examine the defendant and to testify at trial.⁷⁷ Berryman's lawyer, however, notified the court that he had retained his own two psychiatrists to examine and testify regarding the insanity defense, objected to the appointment of the court-appointed experts, and would advise his client not talk to the court's experts if they were appointed.⁷⁸ The trial court appointed its own experts, and when they went to visit Berryman were told that he would not talk with the doctors.⁷⁹ In light of Berryman's failure to cooperate with the court-appointed experts, the State filed a motion to exclude the testimony of Berryman's expert witnesses.⁸⁰ Both had spoken to Berryman and concluded that he was insane at the time of the murder. The State never sought an order compelling Berryman's cooperation with the court-appointed experts, even when the trial court inquired about this possibility on the day before trial.⁸¹ The trial court concluded it would be improper to order the defendant to comply without a motion from the State, denied the State's motion to exclude, and allowed Berryman's experts to testify.⁸²

The court of appeals, in a 2-1 opinion authored by Judge Vaidik, held that the trial court was correct in denying the State's motion to exclude. Relying heavily on the Indiana Supreme Court's 1980 opinion in *McCall v. State*,⁸³ the court reasoned that Berryman was "under no duty to cooperate or face the sanction of exclusion of evidence absent an order [to cooperate] from the trial court."⁸⁴ Berryman was never told that the testimony of his experts could be excluded because of his failure to cooperate with the court's experts.⁸⁵ The court suggested the proper course would have been the State securing an order compelling Berryman's cooperation and a hearing advising him of the consequences for non-compliance.⁸⁶ Finally, consistent with *McCall*, the court noted that the State had the right to offer evidence of Berryman's failure to cooperate and an instruction that his uncooperative conduct could be considered as evidence of his sanity.⁸⁷

76. *Id.* at 742. Indiana Code section 35-38-4-2 allows the State to appeal reserved questions of law, although double jeopardy principles bar a retrial. *Id.* at 746.

77. IND. CODE § 35-36-2-2 (2004).

78. *Berryman*, 796 N.E.2d at 742-43.

79. *Id.* at 743.

80. *Id.*

81. *Id.*

82. *Id.* at 743-44.

83. 408 N.E.2d 1218 (Ind. 1980).

84. *Berryman*, 796 N.E.2d at 745.

85. *Id.*

86. *Id.*

87. *Id.* Relying on Rule 3.4 of the Indiana Rules of Professional Conduct, the court held that defense counsel should not have been allowed to attend the psychiatric evaluations with the court's experts because his sole purpose was to advise his client not to cooperate, which is an "obstructive

The Indiana Supreme Court granted transfer and summarily affirmed the court of appeals with the following revision to one sentence of the opinion: "Had there been such an order compelling Berryman's cooperation, and a hearing advising him that the testimony of his experts could be excluded if he failed to cooperate with the court-appointed experts, the State *would have prevailed* on this issue."⁸⁸ In apparent response to this case, the General Assembly amended the insanity defense statute by adding subsection (c), which provides:

If a defendant does not adequately communicate, participate, and cooperate with the medical witnesses appointed by the court, after being ordered to do so by the court, the defendant may not present as evidence the testimony of any other medical witness:

- (1) with whom the defendant adequately communicated, participated, and cooperated; and
- (2) whose opinion is based upon examinations of the defendant; unless the defendant shows by a preponderance of the evidence that the defendant's failure to communicate, participate, or cooperate with the medical witnesses appointed by the court was caused by the defendant's mental illness.⁸⁹

A couple of months after *Berryman*, the Indiana Supreme Court again addressed the insanity defense statute—but this time disagreed with the court of appeals. Prevailing on a sufficiency of the evidence claim has always been difficult on appeal, but it now appears virtually impossible when challenging the rejection of an insanity defense. In *Thompson v. State*,⁹⁰ the court of appeals reversed a conviction for residential entry because the State submitted no evidence to contradict expert testimony that the defendant was insane at the time of the offense.⁹¹ Previous cases had upheld convictions when, despite expert testimony of insanity, conflicting lay testimony about the defendant's behavior near the time of the crime suggested an appreciation of the wrongfulness of the conduct.⁹²

On transfer, the Indiana Supreme Court went one step further, holding that conflicting lay testimony is not required for a factfinder to reject expert testimony—or for the appellate court to uphold the conviction.⁹³ "If judges and juries can disbelieve uncontradicted testimony about facts, they are surely entitled to decide whether to accept or reject testimony that represents a witness's opinion."⁹⁴ Nevertheless, the court addressed other facts that cut against Thompson's insanity defense, such as her seemingly normal conduct days before

tactic." *Id.* at 746.

88. *State v. Berryman*, 801 N.E.2d 170 (Ind. 2004) (per curiam opinion) (emphasis added).

89. IND. CODE § 35-36-2-2(c) (2004).

90. 782 N.E.2d 451 (Ind. Ct. App. 2003).

91. *Id.* at 453-54.

92. *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004).

93. *Id.* at 1149-50.

94. *Id.* at 1149.

the incident and the trial court's comments about her history of avoiding criminal responsibility, telling conflicting stories, and using alcohol and illegal drugs while on medication.⁹⁵ In affirming the conviction, the supreme court concluded that the evidence on the insanity issue "clearly was in conflict and did not lead inexorably to a single conclusion."⁹⁶

In a separate concurring opinion, Justice Sullivan expressed the view that it was not the court's intent to expand its previous holdings to give even less weight to psychiatric testimony.⁹⁷ There will be insufficient evidence to uphold a conviction in cases of "unanimous credible, expert testimony that a defendant is insane at the time of the crime" in which there is "no other evidence of probative value from which a conflicting inference can be drawn."⁹⁸

III. STATE LAW JURY ISSUES

The right to a fair trial, of which a jury is usually an integral part in criminal proceedings, is deeply ingrained in the federal⁹⁹ and state¹⁰⁰ constitutions. Criminal defendants are entitled to "a fair trial by a panel of impartial, 'indifferent' jurors,"¹⁰¹ "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies."¹⁰² In recent years, Indiana's appellate courts have reversed convictions for a variety of juror-related flaws, some seemingly minor in the scheme of an entire trial and the magnitude of evidence of guilt, in cases involving such things as a juror lying during voir dire in a capital case¹⁰³ or a State's witness socializing with a juror over a lunch-hour recess.¹⁰⁴ That trend continued during the survey period as the appellate courts reversed in three cases because of juror-related issues.

A. Change of Venue

In *Ward v. State*,¹⁰⁵ the supreme court reversed several convictions and a death sentence because the trial court erred in denying the defendant's motion for change of venue from county. The brutal rape and murder of a fifteen-year-old girl at issue occurred in Spencer County, which had a population of just over 20,000.¹⁰⁶ Juror questionnaires completed before trial and the questioning of jurors during voir dire revealed not only widespread discussion and knowledge

95. *Id.* at 1150.

96. *Id.* (quoting *Rogers v. State*, 514 N.E.2d 1259, 1261 (Ind. 1987)).

97. *Id.* at 1151-52 (Sullivan, J., concurring).

98. *Id.* at 1152.

99. U.S. CONST. amend. VI & XIV.

100. IND. CONST. art. I, § 13.

101. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

102. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992).

103. *State v. Dye*, 784 N.E.2d 469 (Ind. 2003).

104. *May v. State*, 716 N.E.2d 419 (Ind. 1999).

105. 810 N.E.2d 1042 (Ind. 2004).

106. *Id.* at 1045.

of the crimes but also a pervasive response—sixty-five percent—that prospective jurors had formed opinions about the guilt of Ward.¹⁰⁷ All but one of the jurors selected to serve on the jury was familiar with the case, and six of the seated jurors had formed a belief about his guilt.¹⁰⁸

A change of venue is provided for generally by Criminal Rule 12, and a criminal statute further allows trial courts the option of drawing a jury from another county in murder and Class A felony cases.¹⁰⁹ Reversal for the denial of a motion for change of venue requires a defendant to show (1) prejudicial pretrial publicity and (2) the inability of jurors to render an impartial verdict.¹¹⁰ Mere exposure to press coverage, even if extensive, is not grounds for a change of venue, but rather the critical inquiry is the extent of prejudice within the community.¹¹¹ Although most jurors claimed to be able to set aside their preconceived belief about the case and were presumed to be giving truthful answers during voir dire, the court found that presumption overcome because of the “deep and bitter hostility shown to be present throughout the community.”¹¹² Moreover, one juror admitted that it would be difficult for her to abandon her belief that Ward was guilty and responded “I don’t know” when asked if she could base her decision solely on the evidence at trial.¹¹³ This juror’s statement alone required a new trial because the empanelling of even one partial juror is grounds for reversal.¹¹⁴

Challenges to the denial of a request for change of venue are quite common in Indiana, but *Ward* represents the unusual case where an abuse of discretion was found. The pervasive prejudice that existed in a small county in *Ward* is uncommon, but *Ward* does signal the importance of an impartial jury and may well give judges pause for concern when confronted with motions for change of venue in the future. To preserve such claims, though, defense counsel should develop the extensive record necessary to allow meaningful consideration of the claim, which includes juror questionnaires, extensive voir dire about the extent and depth of beliefs about the defendant’s guilt and ability to set them aside, and media reports. Finally, although a change of venue is a possibility in any case, trial courts may be especially willing to grant one in a capital case such as *Ward* because of what is at stake. If expense or the inconvenience of moving the trial to a distant county is a concern, Indiana Code section 35-36-6-11 provides the attractive alternative of a local trial with a jury brought in from another county.

107. *Id.* at 1046.

108. *Id.* at 1047.

109. IND. CODE § 35-36-6-11 (2004).

110. *Ward*, 810 N.E.2d at 1049 (citing *Specht v. State*, 734 N.E.2d 239, 241 (Ind. 2000)).

111. *See id.* at 1049.

112. *Id.* at 1049-50.

113. *Id.* at 1050.

114. *Id.*

B. Reversal for Batson Violation

A fair trial requires not only jurors free from the prejudicial taint of publicity but also a jury that has not been purposefully purged of members based on race. *Batson v. Kentucky*¹¹⁵ and its progeny place the burden on a defendant claiming purposeful discrimination in jury selection to show (1) the prosecutor exercised peremptory challenges to remove members of a cognizable racial group, and (2) the circumstances of the case raise an inference that the prosecutor used that practice to exclude prospective jurors based on race.¹¹⁶ Once the prima facie showing has been made, the burden shifts to the State to provide a race-neutral explanation.¹¹⁷ “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”¹¹⁸

In *McCormick v. State*,¹¹⁹ the State used a peremptory challenge to remove the only African American venire person. The prosecutors offered several race-neutral reasons for the strike—the prospective juror was distraught, looked uncomfortable, and her answers made her appear uncomfortable with the process.¹²⁰ However, another reason that was not race-neutral was also offered—that the juror would find it difficult “passing judgment on a member of ones [sic] own in the community.”¹²¹ Therefore, the court was presented with an issue not yet addressed in Supreme Court jurisprudence: “whether the existence of permissible reasons for exercising a peremptory strike is sufficient to overcome an impermissible one.”¹²²

Some federal circuits have examined such cases under a “dual motivation” analysis, which requires the State to demonstrate “that the strike would have been exercised even in the absence of any discriminatory motivation.”¹²³ Several state courts, on the other hand, have rejected this analysis and instead apply a “tainted” approach, which mandates reversal when any discriminatory reason is present, regardless of how many nondiscriminatory ones may have been advanced as well.¹²⁴ Choosing the latter approach, the court recognized that *Batson* “protects against only the most conspicuous and egregious biases,”¹²⁵ and excusing an obvious discriminatory reason “would erode what little protection *Batson* provides against discrimination in jury selection.”¹²⁶

115. 476 U.S. 79 (1986).

116. *McCormick v. State*, 803 N.E.2d 1108, 1110 (Ind. 2004).

117. *Id.*

118. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)).

119. 803 N.E.2d 1108, 1111 (Ind. 2004).

120. *Id.*

121. *Id.* (alteration in original).

122. *Id.* at 1112.

123. *Id.*

124. *Id.*

125. *Id.* at 1113.

126. *Id.* (quoting *Payton v. Kears*, 495 S.E.2d 205, 210 (S.C. 1998)).

*C. The Jury Rules: Questions by Jurors During Trial and
Instructions Upon Inquiry*

In *Ashba v. State*,¹²⁷ the court of appeals addressed, as a matter of first impression, the proper procedures for jurors to pose questions to witnesses at trial. Jury Rule 20 mandates several things that jurors must be told in preliminary instructions, including “that jurors may seek to ask questions of the witnesses by submission of questions in writing.” Even before the adoption of the Jury Rules, which became effective January 1, 2003, Evidence Rule 614(d) had long provided that jurors are permitted to ask questions of witnesses by submitting them in writing after allowing the parties to lodge their objections.¹²⁸

The court in *Ashba* held that the same procedure approved under Rule 614(d)—written submission of questions by jurors, an opportunity for parties to object, and the propounding of the questions to the witness by the trial court—should apply under Jury Rule 20.¹²⁹ The trial court should explain the specifics of the questioning procedures at the outset of the trial, and trial courts may employ “a variety of methods” to obtain the questions, such as glancing at the jury or instructing the jurors to indicate verbally or physically that they have questions.¹³⁰

In *Massey v. State*,¹³¹ the court of appeals reiterated another way in which the Jury Rules have changed longstanding trial practices. Before the Jury Rules, trial courts responded to juror inquiries about legal issues during deliberations with instructions that the juror reread all of the instructions.¹³² The Jury Rules provide greater flexibility, however, and Jury Rule 28 specifically allows inquiry by the trial court upon juror impasse into “how the court and counsel can assist them in their deliberative process,” followed by the trial court directing “that further proceedings occur as appropriate.”¹³³ The trial court in *Massey* was confronted with multiple questions suggesting confusion by the jurors about lesser-included offenses.¹³⁴ It responded by rereading the instructions in their entirety and adding a new instruction about use of the verdict forms for the lesser-included offenses.¹³⁵ Because the additional instruction was not erroneous and giving it was “consistent with the underlying goal of the new jury rules,” the convictions were affirmed.¹³⁶

127. 808 N.E.2d 670 (Ind. Ct. App.), *as corrected by* 818 N.E.2d 540 (Ind. Ct. App. 2004).

128. *Id.* at 674.

129. *Id.*

130. *Id.*

131. 803 N.E.2d 1133 (Ind. Ct. App. 2004).

132. *Id.* at 1137.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1137-39.

D. Deliberations: Limitations on Outside Communication

Indiana courts have been strict and literal in enforcing the requirement that jurors remain together during deliberations unless exigent circumstances warrant a separation.¹³⁷ Four decades ago, the Indiana Supreme Court recognized that a juror's phone call home to arrange for caring of the juror's livestock constituted a separation.¹³⁸ Because the subject of the phone call in that case was "entirely collateral and unrelated to the subject matter of the cause on trial," there was no possibility of prejudice and the conviction was upheld.¹³⁹

Fast forwarding to 2004, the court of appeals in *Pagan v. State*¹⁴⁰ was confronted with two jurors' use of their cell phones to make calls home during deliberations. The court placed the burden upon the defendant to show four things: "(1) extra-judicial communication occurred; (2) pertaining to a matter before the jury; (3) the misconduct was gross; and (4) it probably caused him prejudice."¹⁴¹ Although the bailiff's post-trial testimony established that the calls had occurred, the nature of the calls was, similar to those in *Bryant*, purely personal and outside the protection of the prohibition.¹⁴² Similarly, the misconduct was not found to be "gross," and the defendant did not establish "actual prejudice."¹⁴³

Although ruling against the defendant, the court concluded by acknowledging the legitimacy of the concern for cell phone use during deliberations. "In this day and age, thanks to cell phones, most people now take it for granted that they can call or be called by anyone, anywhere, at any time. This expectation should not be carried into the jury room once deliberations have commenced."¹⁴⁴ Cell phones open the potential for all sorts of abuses including subtle or not-so-subtle pressure from family or business associates based on the length of deliberations, seeking extraneous information relevant to the case through the phone or its Internet access, or the disruptive receipt of calls during deliberations.¹⁴⁵ The court offered two possible solutions when jurors wish to make calls during deliberations: (1) securing the consent of all parties and admonishing the jurors consistent with Jury Rule 29 or (2) requiring a bailiff or

137. See generally *Pagan v. State*, 809 N.E.2d 915, 920 (Ind. Ct. App. 2004) (citing *Follrad v. State*, 428 N.E.2d 1201, 1203 (Ind. 1981)); *id.* at 922 n.5 (citing IND. CODE § 35-37-2-6).

138. *Bryant v. State*, 202 N.E.2d 161 (Ind. 1964).

139. *Id.* at 164.

140. 809 N.E.2d 915, 921 (Ind. Ct. App. 2004).

141. *Id.* at 922. The confusing and seemingly irreconcilable standards applied by Indiana's appellate courts in challenges to communications occurring with jurors is well summarized in Judge Mathias' thoughtful opinion in *Hall v. State*, 796 N.E.2d 388, 395-96 (Ind. Ct. App. 2003).

142. *Pagan*, 809 N.E.2d at 921.

143. *Id.* at 922. Again, as noted in *Hall* and highlighted by Evidence Rule 606(b), requiring a defendant to demonstrate prejudice is usually very difficult, if not impossible. See *supra* note 142 and accompanying text.

144. *Pagan*, 809 N.E.2d at 922.

145. *Id.*

other court official to make the call for the juror.¹⁴⁶ Nevertheless, the court stopped short of encouraging or even requiring court officials to retain cell phones during deliberations, which is arguably crucial to minimizing the many potential abuses noted by the court.

E. Replacing a Juror During Deliberations

Finally, in *Riggs v. State*,¹⁴⁷ the supreme court addressed the standard for allowing replacement of a juror with an alternate after deliberations begin. There, the foreman sent a note to the trial court explaining that one juror was “belligerent, not willing to discuss the issues” after four hours of deliberation.¹⁴⁸ A colloquy with the foreman ensued, and the State later moved that the complained-of juror be replaced with the alternate; Riggs objected.¹⁴⁹ Within the next hour or so, the foreman sent a note explaining that juror Wallace needed to see the judge “ASAP.”¹⁵⁰ With the agreement and presence of the parties, the trial court interviewed Mr. Wallace, who complained he had been accused of “trying to defend the defendant” but asserted that he was going to “give a fair and impartial determination to this evidence and to this Court.”¹⁵¹ Citing concern of what might occur if the juror was returned to deliberations, the trial court dismissed juror Wallace.¹⁵² A verdict of guilty as to the murder and criminal deviate conduct charge was reached three hours later.¹⁵³

The supreme court drew a line between removal of jurors before deliberations—for an abuse of discretion under Trial Rule 47(B)—and removal during deliberations, which requires a “carefully developed record as to the ground for removal and also requires precautions to avoid inappropriate consequences from the removal.”¹⁵⁴ Although physical threats or intimidation justify removal, rudeness and intransigence do not.¹⁵⁵ “A failure to agree, however unreasonable, is a ground for mistrial, not removal of the obstacle to unanimity.”¹⁵⁶ Finally, the court held that the error, which involved the basic right to a fair trial by an impartial adjudicator, was a structural one not amenable

146. *Id.*

147. 809 N.E.2d 322 (Ind. 2004). The court of appeals relied on *Riggs* in upholding a trial court’s decision not to replace a juror who was approached by a witness during a recess and told that witnesses were “lying.” *Spears v. State*, 811 N.E.2d 485, 489 (Ind. Ct. App. 2004). The court further observed that the juror “immediately notified the court and fully explained the nature and content of the contact to the satisfaction of both parties.” *Id.* at 490.

148. *Riggs*, 809 N.E.2d at 324.

149. *Id.* at 325.

150. *Id.* at 326.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 327.

155. *Id.* at 328.

156. *Id.*

to harmless error analysis.¹⁵⁷

IV. SIXTH AMENDMENT IN THE SPOTLIGHT: *CRAWFORD* AND *BLAKELY* AND THEIR IMPACT IN INDIANA

During the survey period, the criminal defense bar's new best friend, Justice Antonin Scalia, authored two landmark Sixth Amendment opinions grounded in centuries-old history but with far-reaching future consequences. The first, *Crawford v. Washington*,¹⁵⁸ overruled decades-old precedent and cast widespread doubt about the admission of hearsay evidence that had been regularly relied upon in many contexts. The second, *Blakely v. Washington*,¹⁵⁹ promised to change the landscape of sentencing in courts around the country, giving new importance to the role of juries as discussed in Part B.

A. *Crawford v. Washington: Let the Confusion Begin*

Since *Ohio v. Roberts*¹⁶⁰ in 1980, the Confrontation Clause had been understood to allow the admissibility of hearsay statements made by an unavailable witness against a criminal defendant if the statements fell "within a firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness."¹⁶¹ In *Crawford*, the Court overruled *Roberts* and held that, consistent with the Confrontation Clause, the prosecution may introduce a "testimonial" out-of-court statement against a criminal defendant only upon two showings: (1) the witness who made the statement is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness.¹⁶² *Crawford* was grounded in the state of the common law in 1791, when the Sixth Amendment was ratified.¹⁶³ Rather than the focus on recognized hearsay exceptions from *Roberts*, under the Court's *Crawford* analysis a statement that was made in a situation that did not allow the defendant an opportunity for examination must be excluded if it is "testimonial."¹⁶⁴ Non-testimonial statements may be admitted at a criminal trial under the prevailing hearsay rules.¹⁶⁵ Testimonial is not specifically defined, although the Court noted that such statements could be unsworn.¹⁶⁶ The court provided the following examples:

ex parte in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was

157. *Id.* at 328-29.

158. 541 U.S. 36 (2004).

159. 124 S. Ct. 2531 (2004).

160. 448 U.S. 56 (1980).

161. *Id.* at 66.

162. 541 U.S. at 68.

163. *Id.* at 53-54.

164. *Id.* at 61.

165. *Id.*

166. *Id.* at 52.

unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.¹⁶⁷

Although *Crawford* suggests a broad approach to “testimonial” statements and a greater reach for the Confrontation Clause, Indiana appellate decisions in the months after *Crawford* suggest some reticence to change longstanding practice. The first mention of *Crawford* was a footnote in *Clark v. State*,¹⁶⁸ where the supreme court correctly noted that “when the declarant appears for cross-examination at trial, the Confrontational Clause places no constraints at all on the use of his prior testimonial statements.”¹⁶⁹ However, the court acknowledged the significance of *Crawford*, which “may have called into question settled evidentiary rulings on a number of related issues. Certainly it made clear that rules of evidence do not trump the Confrontation Clause.”¹⁷⁰

Like *Clark*, none of the post-*Crawford* cases from the Indiana Court of Appeals brought relief to defendants. Transfer was granted in two of the cases and not sought in the third,¹⁷¹ suggesting that the ultimate resolution of the issue will not come for several months, when the Indiana Supreme Court issues its transfer opinions or addresses *Crawford* in a direct appeal. The two cases, *Hammon v. State*¹⁷² and *Fowler v. State*,¹⁷³ were both domestic battery cases. In *Fowler*, the complaining witness testified at trial, albeit it uncooperatively, and therefore one judge would have found *Crawford* inapplicable under the supreme court’s reasoning in *Clark*.¹⁷⁴ The majority, however, following the reasoning in *Hammon* held that complaining witness’s statement was not “testimonial” because it did not occur in a formal setting nor was it contained in a formalized document.¹⁷⁵ As explained in *Hammon*, “when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning

167. *Id.* at 51-52 (citations omitted).

168. 808 N.E.2d 1183, 1189 n.2 (Ind. 2004).

169. *Id.* (quoting *Crawford*, 541 U.S. at 59 n.9).

170. *Id.*

171. See *Rogers v. State*, 814 N.E.2d 695 (Ind. Ct. App. 2004), *trans. not sought*; *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), *trans. granted* (Ind. Dec. 9, 2004); *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *trans. granted* (Ind. Dec. 9, 2004). In *Hendricks v. State*, 809 N.E.2d 865, 871 (Ind. Ct. App. 2004), *trans. denied* (Ind. Sept. 28, 2004), the court correctly held in a post-conviction appeal that *Crawford* had no bearing on its review of whether counsel was ineffective in 1994.

172. 809 N.E.2d 945.

173. 809 N.E.2d 960.

174. *Id.* at 965-66 (Crone, J., concurring in result).

175. *Id.* at 964.

those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not ‘testimonial.’”¹⁷⁶ It specifically excepted from the protective reach of the Confrontation Clause those “preliminary questions asked at the scene of a crime shortly after it has occurred.”¹⁷⁷ Those statements, however, are often the most damaging against a defendant, and the focus of *Crawford* was to not protect domestic violence victims or preserve the excited utterance exception to the hearsay rule¹⁷⁸ but rather a revitalization of the Confrontation Clause to its meaning at the time the Sixth Amendment was ratified.¹⁷⁹

In addition to the domestic violence context, where victims frequently seek not to participate at a trial or recount the events differently (and damagingly to the State’s case) at trial, challenges to the child hearsay statute would seem likely under *Crawford*.¹⁸⁰ Indiana Code section 35-37-4-6 has long allowed the admission of hearsay statements by a child witness found incompetent to testify at trial. Such statements cannot be admitted under the reasoning of *Clark*, because the child witness does not testify at trial. Moreover, the State may face some difficulty in categorizing the interview of the child witness as non-testimonial. Next year’s survey may provide some answers to the *Crawford* fallout in both of these contexts.

B. *The Tremors of Blakely v. Washington Begin to Reach Indiana*

On June 24, 2004, the United States Supreme Court issued *Blakely v. Washington*,¹⁸¹ which Justice O’Connor soon aptly called a No. 10 earthquake.¹⁸² To fully understand and appreciate the significance of *Blakely*, however, a little history and context is helpful. In *Apprendi v. New Jersey*,¹⁸³ the United States Supreme Court reversed a New Jersey trial court’s “hate crime” enhancement of a sentence because the judge, not a jury, determined that the crime was racially motivated. The Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁸⁴ To determine when a fact “increases the penalty . . . beyond the prescribed statutory maximum,” the Court stated, “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater

176. 809 N.E.2d at 952.

177. *Id.*

178. *See Fowler*, 809 N.E.2d at 965.

179. *Crawford*, 541 U.S. at 53-54.

180. *See generally Hendricks*, 809 N.E.2d at 871.

181. 124 S. Ct. 2531 (2004).

182. Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

183. 530 U.S. 466 (2000).

184. *Id.* at 490 (emphasis added).

punishment than that authorized by the jury's guilty verdict?"¹⁸⁵ The Court did not explicitly define "statutory maximum."

In *Blakely*, however, the Court stated precisely what it meant by "statutory maximum." The Supreme Court invalidated Washington's sentencing scheme to the extent it permits a judge to impose what that state refers to as "exceptional" sentences based on facts not found by the jury.¹⁸⁶ Blakely pleaded guilty to kidnapping his estranged wife, and "[t]he facts admitted in his plea, standing alone, supported a maximum sentence of 53 months."¹⁸⁷ The judge, however, imposed a sentence of ninety months after determining that Blakely had acted with "deliberate cruelty."¹⁸⁸ The Court held that Blakely's ninety-month sentence violated the Sixth Amendment, as explained in *Apprendi*, because it was based on facts neither found by a jury nor admitted by Blakely.¹⁸⁹

In *Blakely*, the State argued that the ninety-month sentence was within the range permitted by the plea, because the "statutory maximum" was not fifty-three months, but the maximum permitted generally for Class B felonies, i.e., ten years.¹⁹⁰ The Court flatly rejected that contention, stating: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."¹⁹¹ The Court elaborated,

[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.¹⁹²

Based on this holding, the federal sentencing guidelines quickly came under scrutiny, with the Supreme Court holding arguments on October 4, 2004, in the cases of *United States v. Booker* and *United States v. Fanfan*. Courts in at least three states (other than Washington) soon held that felony sentences in their state are constrained, at least in part, by *Blakely*;¹⁹³ and the Vera Institute concluded that thirteen states (including Indiana) are "fundamentally affected by *Blakely*,"

185. *Id.* at 494.

186. *Blakely*, 124 S. Ct. at 2537-38.

187. *Id.* at 2534.

188. *Id.*

189. *Id.* at 2537-38.

190. *Id.* at 2537.

191. *Id.* (alterations in original).

192. *Id.* (alterations in original).

193. See *Aragon v. Wilkinson ex rel. County of Maricopa*, 97 P.3d 886, 891 (Ariz. Ct. App. 2004) ("In Arizona the 'maximum sentence' the court may impose absent additional findings is the 'presumptive term.'"); *Sigler v. State*, 881 So.2d 14 (Fla. Dist. Ct. App. 2004); *State v. Sawatzky*, 96 P.3d 1288 (Or. Ct. App. 2004).

while another eight states are “possibly affected by *Blakely*.”¹⁹⁴

Although appellate and trial lawyers in Indiana took fairly quick notice of the decision in *Blakely*, the first mention of the *Blakely* case in a published Indiana opinion was an unremarkable one of mere acknowledgment in a footnote in *Wilkie v. State*,¹⁹⁵ which is discussed for its significant holding in Part V.B. of this Article.

The court of appeals then issued two opinions that rejected *Blakely* claims in August and September. First, in *Carson v. State*,¹⁹⁶ Judge Vaidik, writing for Judges Sullivan and May, denied a petition for rehearing that raised a *Blakely* claim after no sentencing challenge was initially raised on appeal.¹⁹⁷ The court found the claim waived because Carson “did not challenge his sentence on direct appeal,”¹⁹⁸ before proceeding to the merits of the claim nonetheless. Without squarely addressing whether *Blakely* applies to Indiana’s presumptive sentencing scheme, the court found no Sixth Amendment violation based on *Blakely*. The courts reasoned that it held the criminal history aggravator is exempt from the *Apprendi/Blakely* rule, and the other two aggravating circumstances—a need for corrective or rehabilitative treatment that can best be provided by incarceration in a penal institution and the strong likelihood that Carson would reoffend based on his criminal history—were “simply derivative” of the criminal history aggravator and “thus would seem also not to implicate the *Blakely* analysis.”¹⁹⁹ A month later, in *Bledsoe v. State*,²⁰⁰ Judge Sullivan, writing for Judges Friedlander and Bailey, followed *Carson* in holding the *Blakely* challenge waived because “Bledsoe did not raise this alleged sentencing error on direct appeal.”²⁰¹ The court proceeded to find no basis for relief on *Blakely* grounds based on the criminal history exception and the view that the other aggravators—“that his rehabilitation could only occur in a penal institution, that he was on probation at the time of the offense, and that the trial court believed that Bledsoe would continue to engage in criminal activities”—were derivative of that history.²⁰² In both cases, the court offered a cursory quasi-harmless-error comment that “a single aggravating circumstance will justify a sentence enhancement.”²⁰³

Although the Indiana Supreme Court said nothing of *Blakely* in its published

194. See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington*, *Practical Implications For State Sentencing Systems*, VERA INSTITUTE OF JUSTICE, STATE SENTENCING & CORRECTIONS POL’Y & PRACTICE REV., Aug. 2004, at 3, available at http://www.vera.org/publication_pdf/242_456.pdf.

195. 813 N.E.2d 794, 799 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

196. 813 N.E.2d 1187 (Ind. Ct. App.), *trans. denied* (Ind. Aug. 20, 2004).

197. *Id.* at 1188.

198. *Id.* at 1188-89.

199. *Id.* at 1189.

200. 815 N.E.2d 507 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 983 (Ind. 2004).

201. *Id.* at 507.

202. *Id.* at 508.

203. *Id.*; *Carson*, 813 N.E.2d at 1189 (both citing *Powell v. State*, 769 N.E.2d 1128, 1135 (Ind. 2002)).

opinions during the survey period, in September it granted transfer and set oral argument in two cases in which *Blakely* claims had been raised for the first time on transfer.²⁰⁴ Those cases, and the many that were percolating through the appellate courts as the survey period ended, posed several significant questions for Indiana's appellate courts.²⁰⁵

C. Does *Blakely* Apply to Indiana's Presumptive Sentencing Scheme?

The threshold question is whether Indiana's presumptive sentencing scheme is affected at all by *Blakely*. Although Washington's sentencing scheme is not identical to Indiana's, the differences between Indiana and Washington are unlikely to be found to outweigh their unconstitutional commonality: sentences are increased beyond that permitted solely by the jury's verdict based on facts found by a judge. In Indiana, a trial judge may deviate from the presumptive sentence only after finding the presence of an aggravating factor.²⁰⁶ Thus, a felony sentence may not be increased from the presumptive sentence, or "fixed term," unless and until the trial judge—not a jury—makes additional findings of fact, i.e., the aggravating factors enumerated in Indiana Code section 35-38-1-7.1(b).

Although in several early briefs the Attorney General described Indiana's felony sentencing statutes as providing a "range of possible sentences," the Code and the supreme court's holdings state otherwise. Indiana Code section 35-35-3-1 explicitly defines "presumptive sentence" as "the penalty prescribed by IC 35-50-2 *without consideration of mitigating or aggravating circumstances*."²⁰⁷ This language practically mirrors the Supreme Court's statement in *Blakely* that the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."²⁰⁸ Therefore, it seems highly likely that Indiana's sentencing scheme is impacted by *Blakely*.

Because a large percentage of sentences are aggravated in Indiana based on criminal history, though, *Blakely* may not impact sentences if the exception

204. The cases are *Heath v. State*, Case No. 57S04-0409-CR-409, and *Smylie v. State*, Case No. 41S01-0409-CR-408. Specific information about each case and all Indiana appellate cases may be accessed from the online docket of the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court at the following website: <http://hostpub.courts.state.in.us/HostPublisher/ISC3RUS/ISC2menu.jsp>.

205. The author served as co-counsel of an amicus brief filed on behalf of the Marion County Public Defender Agency in the *Heath* and *Smylie* cases. Many of the ideas and some of the text in this section of the article have their genesis in the drafting process and subsequent discussion of that brief with co-authors Ann Sutton, Kathleen Sweeney, and Mike Limrick, as well as lawyers from around the state.

206. IND. CODE § 35-35-3-1 (2004); *Trowbridge v. State*, 717 N.E.2d 138, 149 (Ind. 1999); *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999).

207. IND. CODE § 35-35-3-1 (emphasis added).

208. *Blakely*, 124 S. Ct. at 2537.

recognized in *Carson* and *Bledsoe* applies. This issue is not as simple as it might seem, though. Indiana's aggravating circumstance is that a defendant "has a history of criminal or delinquent activity."²⁰⁹ Exempt from the rule of *Apprendi* and *Blakely* is "the fact of a prior conviction,"²¹⁰ although the continued viability of that exception is somewhat in doubt.²¹¹ Nevertheless, as the supreme court has acknowledged, a "history of criminal activity" is not necessarily the same as a "fact of a prior conviction." In *Wooley v. State*, the court noted, "a criminal history comprised of a single, nonviolent misdemeanor is not a significant aggravator in the context of a sentence for murder."²¹² Implicit in this statement is that the determination whether a defendant has a "history" of criminal activity—as distinguished from "a prior conviction"—is not simply a binary question unmistakably proved by reference to certified court documents but rather is a subjective determination that, under *Apprendi* and *Blakely*, should be left to a jury.

At some point the Indiana Supreme Court will need to define the outer limits to the "history of criminal activity" aggravator, which was given an expansive reading in *Carson* and *Bledsoe*. The Supreme Court has itself described the "prior conviction" exception as exceedingly narrow and "at best an exceptional departure" from the rule in *Apprendi* and *Blakely*.²¹³ The court of appeals' broad reading in *Carson* and *Bledsoe* may well not survive scrutiny when the Indiana Supreme Court addresses the issue or when the Supreme Court reconsiders the exception itself.²¹⁴

D. May the Trial or Appellate Courts Cure the Unconstitutionality of Indiana's Statutes—and, if so, What is a Constitutional Remedy?

Pursuant to *Blakely*, for the State to increase constitutionally a defendant's sentence beyond the presumptive, two basic requirements must be satisfied: (1) there must be a charging instrument that provides notice of the sentence-increasing factor; and (2) the sentence-increasing factor must be submitted to a jury for a determination, beyond a reasonable doubt, of its existence.²¹⁵ The criminal code, however, provides no such procedures, and to create them judicially would seem to violate both the prohibition on common-law crimes and the separation of powers doctrine of article III, section 1 of the Indiana

209. IND. CODE § 35-38-1-7.1(b)(2).

210. *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490).

211. The exception stems from the United States Supreme Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). But in *Apprendi*, Justice Thomas—who joined the 5-4 *Almendarez-Torres* majority—retreated from his position in *Almendarez-Torres*, criticizing his own vote in that case. *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) ("[I]t is evident why the fact of a prior conviction is an element under a recidivism statute [thus requiring a jury finding].").

212. 716 N.E.2d 919, 929 (Ind. 1999).

213. *Apprendi*, 530 U.S. at 487.

214. See *supra* note 211 and accompanying text.

215. 124 S. Ct. at 2536-37.

Constitution.

According to statute, “[c]rimes shall be defined and punishment therefore fixed by statutes of this state and not otherwise.”²¹⁶ If the State seeks an increase from the statutory “fixed term”²¹⁷ based on an aggravating factor, the State must charge that aggravating factor because, under *Apprendi*, it is an essential element of the crime.²¹⁸ Indiana law, however, provides no such procedure, and to impose one judicially would result in the creation of common law crimes prohibited by Indiana Code section 1-1-2-2. For example, the statute describing “robbery” states:

A person who knowingly or intentionally takes property from another person or from the presence of another person:

- (1) By using or threatening the use of force on any person; or
- (2) By putting any person in fear; commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant.²¹⁹

This statute sets forth three types of robberies, the elements of each, and (by reference to the applicable felony class) the resulting penalty. For trial courts to permit the State to charge an additional (aggravating) element, as required by *Blakely*, would result in the creation of a new crime, i.e., the charge would include an element “essential to the punishment” that is not referred to in the robbery statute. This result is impermissible under Indiana law.²²⁰

Moreover, such a result would be impracticable as the criminal code is currently designed. The statute outlining aggravating factors includes such factors as: “The person is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility.”²²¹ There is no manner of indictment or information that could include that factor as an element of the offense and still meet the Indiana Supreme Court’s requirement that “[t]he violation of a statute defining an offense consist[] in the commission

216. IND. CODE § 1-1-2-2 (2004).

217. *See id.* §§ 35-50-2-3 to -7.

218. *See Blakely*, 124 S. Ct. at 2536 (“[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.”) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)); *McCormick v. State*, 119 N.E.2d 5, 7 (Ind. 1954) (“[T]he accused has a right to have all the essential elements that enter into the offense, charged in the affidavit, so that he may know what he has to meet . . .”) (internal quotation marks omitted).

219. IND. CODE § 35-42-5-1.

220. *See Knotts v. State*, 187 N.E.2d 571, 573 (Ind. 1963) (“In Indiana no common-law crimes exist, and the legislature fixes the elements necessary for any statutory crime.”).

221. IND. CODE § 35-38-1-7.1(b)(3).

of certain acts under *specified circumstances* and in some cases with a specified knowledge or particular intent.”²²² An offense “must be charged in direct and unmistakable terms, and the charge must be such that the defendant may know definitely what he has to meet.”²²³ Stating in a charging instrument that “the defendant is in need of correctional or rehabilitative treatment” specifies no conduct, no knowledge, and no intent.

In addition, there is no statutory provision by which a jury may hear evidence of aggravating circumstances. Instead, Indiana Code section 35-38-1-3 requires trial courts alone to “conduct a hearing to consider the facts and circumstances relevant to sentencing.”²²⁴ Without such statutory authority, a trial court may not permit a jury to hear that evidence without seemingly violating the Separation of Powers doctrine of article III, section 1 of the Indiana Constitution.²²⁵

In the wake of *Blakely*, the State began arguing that *Lawrence v. State*,²²⁶ authorized the convening of a sentencing jury to hear evidence of aggravating factors. In *Lawrence*, the Indiana Supreme Court held that a defendant’s right to a fair trial was infringed when evidence of his habitual offender status was presented at the same time as evidence of the underlying offense.²²⁷ The court then created a bifurcated trial procedure, leaving the presentation of habitual offender evidence until after a guilty verdict is rendered.²²⁸ However, *Lawrence* appears inapposite, as the statute at issue there explicitly provided for habitual offender evidence to be presented to a jury. Here, the statute permitting consideration of aggravating factors explicitly states that the evidence is to be presented to the court alone. While the holding in *Lawrence* simply affected the timing of the evidentiary presentation permitted by the statute, the State’s position with regard to *Blakely* would require the Court to read into the statute something that was never envisioned and is originally prohibited.²²⁹

In short, the problems created by *Blakely* are not the sort of fender-benders that can be fixed in the judicial body shop; they are a massive pile-up that requires legislative intervention.²³⁰ The supreme court has noted that “even in an

222. *McCormick*, 119 N.E.2d at 7 (emphasis added).

223. *Id.* at 7 (internal quotation marks omitted); see also IND. CODE § 35-34-1-2.

224. IND. CODE § 35-38-1-3.

225. *Cf. Deasy-Leas v. Leas*, 693 N.E.2d 90, 99 (Ind. Ct. App. 1998) (“In any event, this Court may not assume a legislative function and pronounce a guardian ad litem privilege where no statutory provision exists.”).

226. 286 N.E.2d 830 (Ind. 1972).

227. *Id.* at 833-34.

228. *Id.* at 835-36.

229. See IND. CODE § 35-50-1-1.

230. Although article VII, section 4 vests the Indiana Supreme Court with the power of “supervision of the exercise of jurisdiction by the other courts of the State,” this supervisory power has not tread into the legislative arena in a manner that would raise separation of powers concerns. See, e.g., *Williams v. State*, 690 N.E.2d 162, 169-70 (Ind. 1997) (courtroom security procedures); *Williams v. State*, 669 N.E.2d 1372, 1381-82 (Ind. 1996) (exclusion of jurors based on race); *Winegeart v. State*, 665 N.E.2d 893, 902 (Ind. 1996) (reasonable doubt instruction). None of these

effort to save a statute from constitutional infirmity, a court cannot effectively rewrite it.”²³¹ Allowing trial courts to convene a jury to consider the State’s proposed aggravating circumstances would force courts to transform “aggravating circumstances” into statutory offenses, and alter the statutory requirement that judges determine aggravating circumstances to say just the opposite.²³² Similarly, the sections prescribing felony penalties would have to be rewritten to make clear that aggravating “circumstances” are actually offenses and can be found only by a jury.²³³

Title 35 of the Indiana Code states that its provisions shall be construed with the general purpose of “secur[ing] simplicity in procedure.”²³⁴ Any sort of fix—legislative or judicial—would create a different and complicated felony trial procedure from the filing of an information through discovery, trial, and sentencing. This is not a judicial function, and the proper course would be for the appellate courts to simply declare the current statutory scheme unconstitutional, leaving the necessary overhaul where it belongs: the legislature.

E. Who May Reap the Benefits of Blakely on Appeal?

Not surprisingly the State began arguing waiver—or forfeiture—for failure to object on *Apprendi* grounds in the trial court or, as a fallback, failure to raise such a claim initially on appeal. Within months of *Blakely*, the Seventh Circuit Court of Appeals and other courts held that the rule announced in *Blakely* was a new constitutional rule because it was “based on the Constitution and was not dictated or compelled by *Apprendi* or its progeny.”²³⁵ This is consistent with the approach Indiana courts had taken with respect to *Apprendi* since 2000. Until *Blakely*, no Indiana court had ever suggested that *Apprendi* would be applied in such a way as to invalidate this state’s felony sentencing scheme.²³⁶ As a matter of principle, defendants should not be held to have waived these claims when the courts clearly would not have recognized them in the first instance. As a matter

cases involved statutory rules or procedures, let alone involved the wholesale rewriting of statutes necessitated by *Blakely*.

231. *Baldwin v. Reagan*, 715 N.E.2d 332, 339 n.10 (Ind. 1999); cf. *State ex rel. Young Metal Prods., Inc. v. Lake Superior Court Room No. 5*, 258 N.E.2d 853, 858 (1970) (“Where the legislature has by statute afforded a remedy and the prescribed procedure to be followed in connection with the remedy, then the procedure must be strictly followed.”).

232. See IND. CODE §§ 35-38-1-3, 35-38-1-7.1, 35-50-1-2, 35-50-2-11, 35-50-2-13, 35-50-2-14.

233. *Id.* §§ 35-50-2-3 to -7.

234. *Id.* § 35-32-1-1.

235. *Simpson v. United States*, 376 F.3d 679, 681 (7th Cir. 2004).

236. See, e.g., *Parker v. State*, 754 N.E.2d 614 (Ind. Ct. App. 2001) (statutory maximum for Class A felony in Indiana is fifty years, not thirty-year presumptive); see also *Leone v. State*, 797 N.E.2d 743, 750 (Ind. 2003) (implying that a guilty plea to the underlying offense necessarily results in waiver of the right to jury trial of aggravating factors).

of federal constitutional law, the benefits of *Blakely* would appear to be fully available in appeals that are not yet final.²³⁷

The Indiana Supreme Court has repeatedly noted that it is fundamental error to "permit a conviction upon a charge not made."²³⁸ As discussed above, any attempt to judicially rewrite Indiana's statutes to jive with *Blakely* would permit convictions based upon elements of the crime (aggravating factors) that were never charged. These errors would thus not be subject to waiver.²³⁹

In addition to the fundamental error doctrine, the supreme court has observed that "the constitutionality of a criminal statute may be raised at any stage of the proceeding including raising the issue *sua sponte* by this Court,"²⁴⁰ a principle that has been echoed by the court of appeals in a number of cases.²⁴¹ Whether grounded in federal constitutional law or state fundamental error doctrine, the courts appear obligated to address *Blakely* claims raised at any juncture on direct appeal.

V. DEATH PENALTY

The dubious constitutionality of Indiana's death penalty in the wake of *Apprendi v. New Jersey*²⁴² and *Ring v. Arizona*²⁴³ was discussed at length in a previous survey.²⁴⁴ In March of 2002, the Indiana Supreme Court upheld the constitutionality of Indiana's death penalty statute in *Saylor v. State*,²⁴⁵ a post-conviction appeal in which the jury had unanimously recommended against imposition of a death sentence but the trial judge overrode that recommendation, relying heavily on the Supreme Court's 1990 opinion in *Walton v. Arizona* and a creative interpretation of "statutory maximum" from a couple of different

237. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (observing that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"). Nevertheless, the court of appeals held that *Blakely* claims cannot be raised in a petition for rehearing. *Carson v. State*, 813 N.E.2d 1187, 1188-89 (Ind. Ct. App. 2004).

238. *Martin v. State*, 480 N.E.2d 548, 551 (Ind. 1985) (quoting *Griffin v. State*, 439 N.E.2d 160, 162 (Ind. 1982)) (internal quotation marks omitted).

239. See *Stevens v. State*, 422 N.E.2d 1297, 1303 (Ind. Ct. App. 1981) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried would be sheer denial of due process.").

240. *Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992).

241. See, e.g., *Vaughn v. State*, 782 N.E.2d 417, 419-20 (Ind. Ct. App. 2003); *Haggard v. State*, 771 N.E.2d 668, 673 n.7 (Ind. Ct. App. 2002); *Cooper v. State*, 760 N.E.2d 660, 664 (Ind. Ct. App. 2001).

242. 530 U.S. 466 (2000).

243. 536 U.S. 584 (2002).

244. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1003-13 (2003).

245. 765 N.E.2d 535 (Ind. 2002).

Indiana statutes.²⁴⁶ *Ring* overruled *Walton* and offered a view of statutory maximum that seems nearly impossible to square with the one explained in *Saylor*.²⁴⁷ Nearly two years after rehearing was sought in *Saylor*, the Indiana Supreme Court opted to avoid the *Ring* issue and instead vacated Saylor's death sentence based on independent state law grounds of the "appropriateness" of the sentence under Appellate Rule 7(B) and the court's constitutional authority to review and revise sentences.²⁴⁸ Justice Boehm, writing for the majority, relied on the 2002 statutory amendment that removed the possibility of a judicial override as the basis of the decision to reduce the sentence to 100 years.²⁴⁹

Saylor is one of only three individuals currently under a death sentence despite a jury's recommendation to the contrary. By virtue of the 2002 amendments to the death penalty statute, no future executions will take place without a jury recommendation. Under these circumstances, it is inappropriate to carry out a death sentence that could not be imposed today.²⁵⁰

Chief Justice Shepard dissented, noting that the appropriateness of Saylor's sentence had been reviewed on direct appeal and the statutory amendment "had little to do with defendants situated like Benny Saylor, whose jury, after all, found beyond a reasonable doubt both the aggravating circumstances that render him eligible for the death penalty."²⁵¹

Within days of the rehearing opinion in *Saylor*, the court issued several other death penalty opinions that clarified important, lingering questions about Indiana's death penalty statute. In *Ritchie v. State*,²⁵² the court addressed whether the State must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. The current version of the death penalty statute requires that before the jury may recommend the death penalty, it must find that "(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances."²⁵³ Nevertheless, the court rejected Ritchie's argument that the weighing determination was a fact that must be determined beyond a reasonable doubt.²⁵⁴ This conclusion is difficult to square not only with the language of the statute and but also the decisions in *Apprendi* and *Ring*; two findings are required—a defendant may be not sentenced to death solely because of the

246. See Schumm, *supra* note 244, at 1005-06.

247. *Id.* at 1007-09.

248. See IND. CONST. art. VII, § 4; *Saylor v. State*, 808 N.E.2d 646 (Ind. 2004).

249. *Saylor*, 765 N.E.2d at 651.

250. *Id.*

251. *Id.* at 652 (Shepard, C.J., dissenting).

252. 809 N.E.2d 258 (Ind. 2004).

253. IND. CODE § 35-50-2-9(I) (2004).

254. *Ritchie*, 809 N.E.2d at 268.

existence of an aggravating circumstance.²⁵⁵

The question is a far-reaching one, because subsection f of the death penalty statute allows a trial court to dismiss a hung jury and impose a death sentence.²⁵⁶ In *State v. Barker*,²⁵⁷ the court upheld the statute, concluding that as long as the jury has found an aggravating circumstance, the trial court may impose a death sentence—acting alone without a jury—consistent with subsection f and the holdings in *Ring* and *Apprendi*.²⁵⁸ Because the death penalty statute now requires trial courts to “provide a special verdict form for each aggravating circumstance alleged,”²⁵⁹ a jury may unanimously find certain aggravating circumstances but not reach unanimous agreement as to the weighing of aggravating and mitigating circumstances.²⁶⁰ In such cases, the court reasoned that subsection f would allow the trial court to discharge the jury and impose the sentence acting alone.²⁶¹ If the jury could not reach agreement as to the existence of the aggravating circumstance(s), however, the trial court could not impose sentence and would rather be required to declare a mistrial and submit the case to a new jury for a new penalty phase.²⁶²

In *Barker* and two other cases,²⁶³ the court held that the amended version of subsection e, which had previously allowed a trial court to impose a sentence different from the one recommended by the jury²⁶⁴ but was amended to provide that the court “shall sentence the defendant” according to the recommendation,²⁶⁵ eliminates the trial court’s ability to override or modify a jury’s recommendation. As the court put it, “there is only one sentence determination, which is made by the jury, and the judge must apply the jury determination.”²⁶⁶ The term “determination” is not used in the statute, however, and the word “recommendation” is not only a misnomer but one of potential consequence. In *Stroud v. State*, the court reversed three death sentences because the trial court

255. See generally Michael R. Limrick, *Indiana Supreme Court Addresses Impact of Apprendi on Capital Sentencing Statute*, RES GESTAE, June 2004, at 22. That the weighing is not a “fact” that must be proved beyond a reasonable doubt enjoys some support in opinions of other states and even Supreme Court precedent. See *Ritchie*, 809 N.E.2d at 266-67; see also Limrick, *supra*, at 23 & n.26 (citing *Harris v. Alabama*, 513 U.S. 504, 512 (1995)).

256. IND. CODE § 35-50-2-9(f).

257. 809 N.E.2d 312 (Ind. 2004).

258. This is somewhat remarkable because it required the court to refuse to accept the State’s concession to the contrary. *Id.* at 315-16.

259. IND. CODE § 35-50-2-9(d).

260. *Barker*, 809 N.E.2d at 316.

261. *Id.*

262. *Id.*

263. *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004).

264. See *Barker*, 809 N.E.2d at 318.

265. IND. CODE § 35-50-2-9(e).

266. *Stroud*, 809 N.E.2d at 287.

had improperly instructed the jury as to the effect of its “recommendation.”²⁶⁷ There, the trial court instructed the jury, in part, that a recommendation for death “is a recommendation only and the Judge will sentence the defendant to death or life imprisonment without parole. The law does not require that the Judge must follow your sentencing recommendation.”²⁶⁸ This violated *Caldwell v. Mississippi*,²⁶⁹ because the true sentencer (the jury) had been “led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”²⁷⁰ A proper instruction would instead tell that jury that it would make a sentencing recommendation “and the judge would ‘sentence the defendant accordingly.’”²⁷¹

In a concurring opinion in *Helsley v. State*,²⁷² Justice Boehm raised the issue of whether a trial court could override a jury’s recommendation for death if the aggravating circumstance was not supported by sufficient evidence.²⁷³ Trial Rule 57(J)(7) allows a trial judge to act as a “thirteenth juror” when a jury’s verdict is against the weight of evidence. In Justice Boehm’s view, this rule allows a trial judge to set aside a jury’s recommendation if it is not supported by the evidence.²⁷⁴

After these cases were decided, the United States Supreme Court held in *Schriro v. Summerlin*²⁷⁵ that *Ring v. Arizona* is not available to death row defendants on collateral review as a matter of federal constitutional law. Although the Indiana Supreme Court could adopt a different approach as a matter of state law,²⁷⁶ this would seem unlikely to garner majority support from the court’s current membership.

Finally, the most significant development in Indiana capital punishment law did not occur in the judiciary or legislature. Rather, Governor Joe Kernan, for the first time in nearly half a century, exercised his constitutional power of clemency²⁷⁷ to an inmate on death row.²⁷⁸ As summarized in last year’s survey,

267. *Id.* at 290.

268. *Id.* at 289.

269. 472 U.S. 320 (1985).

270. *Stroud*, 809 N.E.2d at 289 (quoting *Caldwell*, 472 U.S. at 328-29)).

271. *Id.* at 290 (quoting IND. CODE § 35-50-2-9(e) (Supp. 2002)).

272. 809 N.E.2d 292 (Ind. 2004).

273. *Id.* at 306 (Boehm, J., concurring).

274. *Id.* at 306-08.

275. 124 U.S. 2519, 2526 (2004).

276. See *Saylor v. State*, 808 N.E.2d 646, 649 (Ind. 2004) (observing pre-*Schriro* “we do not need to await resolution of this federal constitutional issue, and also do not address whether, even if there is no federal requirement that *Ring* be applied retroactively, Indiana may nevertheless choose to apply it to pre-*Ring* convictions as a matter of state law”).

277. IND. CONST. art. V, § 17.

278. See Mary Beth Schneider & Theodore Kim, *Governor Spares Life of Inmate; Convicted Killer of Gary Couple Was to be Executed Next Week*, INDIANAPOLIS STAR, July 3, 2004, at 1A. Governor Kernan’s decision also received support from the editorial board of the Indianapolis Star. See *Inmate Didn’t Deserve Death*, INDIANAPOLIS STAR, July 3, 2004, at 12A.

Governor O'Bannon issued a stay of execution just days before the scheduled execution of Darnell Williams.²⁷⁹ The Governor's statement commented on the "unique circumstances" of the case and its stated purpose was to allow DNA testing that would "permit all potentially relevant evidence to be discovered."²⁸⁰ Those test results were reviewed nearly a year later by the Indiana Supreme Court, which concluded "what the DNA test results seem to show is not much different from what was presented at trial."²⁸¹

Governor Kernan followed the unanimous recommendation of the five-member parole board in commuting Williams' sentence to life imprisonment.²⁸² He offered a fairly detailed explanation of his decision, specifically referring to Williams' mental status (IQ of 78-81 and special education classes), Williams' lesser degree of culpability than his co-defendant who had been spared the death sentence, and finally the "doubt as to Williams' direct participation" in the murders.²⁸³

VI. APPELLATE SENTENCE REVIEW

This Article ends, as has become a tradition over the past several years, with some reflection on the year in appellate sentence review. Once again, the issue appears to have been the most frequently raised and successful of the many issues litigated in criminal appeals. The distinction between the procedural finding of aggravating and mitigating circumstances and the substantive review of the resulting sentence for its reasonableness or appropriateness received little discussion during the survey period,²⁸⁴ although claims from both genres were raised.

A. Procedural Sentencing Claim: Race as an Aggravating Circumstance

When a trial court relies on aggravating circumstances to enhance a sentence, it must state the "specific reason why each circumstance is determined to be . . . aggravating."²⁸⁵ In a pair of cases during the survey period, the appellate courts addressed the propriety of race as an aggravating circumstance.

In *Witmer v. State*,²⁸⁶ the Indiana Supreme Court began its opinion with some appropriate indignation: "It is hard to imagine that in this age two young white men could troll around town looking for an African-American to kill just so they

279. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1008 (2004).

280. *Id.*

281. *Williams v. State*, 808 N.E.2d 652, 660 (Ind. 2004).

282. *Schneider & Kim*, *supra* note 278.

283. *Id.*

284. *See generally* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 665-66 (2001).

285. *McCann v. State*, 749 N.E.2d 1116, 1119 (Ind. 2001).

286. 800 N.E.2d 571 (Ind. 2003).

could say they had done so.”²⁸⁷ Although the court had never been confronted with the propriety of aggravating a sentence based on the race of the victim, it had held that “characteristics of the victims can support an enhanced sentence.”²⁸⁸ After considering cases from other states that had upheld the propriety of considering the race of the victim at sentencing as well as the non-exclusive list of aggravating circumstances in Indiana’s sentencing statute,²⁸⁹ the court concluded “without hesitation that racially motivated crimes are intolerable and may constitute an aggravating circumstance.”²⁹⁰

Months later, in *Williams v. State*,²⁹¹ the court of appeals was confronted with the trial court’s reliance on the defendant’s race as an aggravating circumstance. Jerome Williams and another man decided to rob an eighty-two-year-old woman and strangled her to death in the process. Williams and his cohort were African-American; the woman was white.²⁹² In sentencing Williams after he pleaded guilty to felony murder, the trial court found as an aggravating circumstance that the “crime impacted the community especially elderly people and increased their fear of African-Americans.”²⁹³ The trial court also observed that Williams’s crime would “set back racial relations” and that “it’s going to make people [even] more concerned about people of color being in their neighborhoods.”²⁹⁴

The court of appeals observed that it was “very uncomfortable with the trial judge’s reference to the fact that Williams is African-American and the victim is white.”²⁹⁵ Although the court found the trial court’s concern about race relations “laudable,” the “use of race to address that concern” was impermissible.²⁹⁶ The case was remanded for resentencing.²⁹⁷

B. Substantive Sentence Review

Article VII, sections 4 and 6 of the Indiana Constitution provide for the review and revisions of statutorily authorized sentences. Appellate Rule 7(B) is the current mechanism through which these provisions are applied, and provides for appellate revision of sentences that are “inappropriate in light of the nature of the offense and character of the offender.”²⁹⁸ Appellate Rule 7(A), however,

287. *Id.* at 571.

288. *Id.* at 573.

289. *See* IND. CODE § 35-38-1-7.1(b) (2004).

290. *Witmer*, 800 N.E.2d at 573.

291. 811 N.E.2d 462 (Ind. Ct. App. 2004).

292. *Id.* at 464-65.

293. *Id.* at 464.

294. *Id.* at 465.

295. *Id.*

296. *Id.*

297. *Id.* at 466.

298. IND. APP. R. 7(B). The adoption of the “inappropriate” standard, as a replacement to the previously less-deferential “manifestly unreasonable” standard, was discussed in the 2003 survey. *See Schumm, supra* note 279, at 1032-33.

excludes appeals of sentences by the State, even though such appeals would likely increase the “consistency” in sentencing that underlies the rule.²⁹⁹

1. *Substantive Review of Sentences Imposed Under a Plea Agreement*.—An important threshold question in cases involving substantive sentence review is whether the case is eligible for appellate review. Three court of appeals cases during the survey period took three different approaches to the effect of a plea agreement on a defendant’s ability to challenge his or her sentence on appeal.³⁰⁰

Sentences imposed pursuant to plea agreements that afford the trial court discretion have often been reviewed by Indiana’s appellate courts.³⁰¹ As the Indiana Supreme Court has observed, defendants are “entitled to contest the merits of a trial court’s sentencing discretion where the court has exercised sentencing discretion.”³⁰² Without citation to these cases or reference to the frequency of the practice, the court of appeals held in *Gist v. State*,³⁰³ in March of 2004 that a defendant pleading guilty to a Class B felony pursuant to an agreement with a cap of ten years “necessarily agreed that a ten-year sentence was appropriate” and therefore was unassailable under Appellate Rule 7(B) on appeal.³⁰⁴

The court reasoned that, if Gist thought ten years was an inappropriate sentence, he should “have taken his chances at trial without the benefit of a plea agreement,” but this seems to miss the mark.³⁰⁵ In many cases guilt is uncontestable, and a defendant who desires to plead guilty is at the mercy of the State when negotiating the most favorable agreement. If the agreement affords the trial court some discretion, and the trial court exercises that discretion at the higher end of the range, a challenge to the appropriateness of the sentence through the independent review function of the appellate courts seems quite reasonable.

Five months later in *Wilkie v. State*,³⁰⁶ another panel took issue with the

299. See *Rodriguez v. State*, 785 N.E.2d 1169, 1177 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 50 (Ind. 2003).

300. Related but unresolved during the survey period is the proper timing of a sentencing challenge brought after a plea agreement. In *Taylor v. State*, 780 N.E.2d 430 (Ind. Ct. App. 2003), the court of appeals held that defendants who pleaded guilty must raise sentencing challenges on direct appeal if at all. However, in *Collins v. State*, 800 N.E.2d 609 (Ind. Ct. App. 2003) and *Gutermuth v. State*, 800 N.E.2d 592 (Ind. Ct. App. 2003), the court of appeals held that sentencing challenges in which defendants were not advised of their right to appeal the sentence could be raised in a postconviction proceeding. The State’s petitions to transfer in *Collins* and *Gutermuth* were granted, so resolution of this conflict will likely be addressed in the next survey period.

301. See, e.g., *Sensback v. State*, 720 N.E.2d 1160, 1166 (Ind. 1999); *Westmoreland v. State*, 787 N.E.2d 1005, 1012 (Ind. Ct. App. 2003); *Rodriguez v. State*, 785 N.E.2d 1169 (Ind. Ct. App. 2003).

302. *Tumulty v. State*, 666 N.E.2d 394, 396 (Ind. 1996).

303. 804 N.E.2d 1204 (Ind. Ct. App. 2004).

304. *Id.* at 1206-07.

305. *Id.* at 1207.

306. 813 N.E.2d 794 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

breadth of the seemingly sweeping holding in *Gist*. There, the defendant pleaded guilty to two Class C felonies pursuant to an agreement that provided for concurrent terms but allowed the trial court to select the term of years.³⁰⁷ The trial court imposed the maximum of eight years, and an appeal ensued.³⁰⁸ Relying on *Gist*, the State argued that Wilkie could not challenge the appropriateness of his sentence because he pleaded guilty pursuant to a plea agreement.³⁰⁹ The *Wilkie* panel first distinguished the plea agreement from the one in *Gist*, where the State had limited its sentencing recommendation to the presumptive term and which acknowledged that the defendant was induced to plead guilty based on that sentencing recommendation.³¹⁰ “By signing an agreement in which he attested only that he understood the range of sentences which the trial court could impose by law, Wilkie did not in any way agree that a maximum sentence was appropriate.”³¹¹ The court disagreed with *Gist* to the “extent that it suggests that anytime a defendant voluntarily enters into a plea agreement, that defendant is thereafter barred from challenging his sentence as inappropriate.”³¹² Instead, the court concluded that only defendants who sign agreements agreeing “to a specific term of years, or to a sentencing range other than the range authorized by statute” have forfeited 7(B) claims.³¹³

Finally, in *Bennett v. State*,³¹⁴ the defendant pleaded guilty pursuant to a plea agreement that left sentencing to the discretion of the trial court and then challenged his maximum three-year sentence for operating a vehicle while intoxicated (with a prior) on appeal. The panel in *Bennett* went a step beyond *Gist* in holding that “when a defendant is sentenced in accordance with a plea agreement, he has implicitly agreed that his sentence is appropriate.”³¹⁵ Reasoning that sentencing fell “within the ambit of the trial court’s discretion upon acceptance of the agreement,” the court reasoned that the defendant “may not now complain” about his maximum sentence.³¹⁶ Remarkably, *Bennett* was originally issued as a not-for-publication opinion; it was later ordered published upon the State’s motion. The State realized its significance, but it is likely not the last word on the subject, as suggested by the irreconcilable inconsistencies. Moreover, all three opinions seemingly conflict with Indiana Supreme Court precedent in *Tumulty*³¹⁷ as well as the practice of sentence review in both the supreme court and court of appeals in recent years.

The opinions raise some serious practical concerns for trial courts and

307. *Id.* at 798.

308. *Id.*

309. *Id.* at 802.

310. *Id.* at 803.

311. *Id.*

312. *Id.*

313. *Id.* at 804.

314. 813 N.E.2d 335 (Ind. Ct. App. 2004).

315. *Id.* at 338.

316. *Id.*

317. See *supra* note 302 and accompanying text.

litigants. If every defendant who pleads guilty pursuant to a plea agreement that gives the trial court discretion has forfeited the right to challenge the sentence under Appellate Rule 7(B), far fewer defendants will likely plead guilty. Little—if anything—would be gained by pleading guilty, especially in counties where prosecutors insist on a plea agreement to the highest charge. Even in the face of overwhelming guilt, defendants with cases pending before judges known to be tough at sentencing would seemingly be better off to go to trial simply to preserve their right to appeal the sentence. The burdens imposed on an already overwhelmed trial system seem considerable.

Moreover, what advisements should trial courts provide to defendants who plead guilty? It is not uncommon to advise these defendants of their right to appeal a sentence, which may no longer be a right or may be a severely restricted one.³¹⁸ Finally, in light the overarching goal of appellate sentence review—to ensure that similar defendants who commit similar crimes are treated similarly³¹⁹—it should make no difference if the plea agreement sets a cap, a range, or is entirely open. If all Rule 7(B) appeals are precluded after a guilty plea, there will be little incentive for a defendant to plead guilty and forego the important—and often successful—right to challenge the sentence imposed.

2. *Some Specific Cases.*—In *Serino v. State*,³²⁰ Chief Justice Shepard, writing for a unanimous court, provided a thorough and thoughtful history of appellate sentence review. In considering the approaches of the federal sentencing guidelines and some states, the court aptly observed that, although difficult, “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”³²¹ After tracing the history and purpose of the 1970 Indiana constitutional amendment that provides for appellate sentence review as well as the iterations of the appellate rule that have implemented it, the Court concluded that it had over the years “taken modest steps to provide more realistic appeal of sentencing issues. . . . [The current] formulation places central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor.”³²²

Serino was convicted of child molesting and sexual misconduct involving a teenage boy over a period of three years. He was sentenced to 385 years in prison, a sentence well “outside the typical range of sentences imposed for child molesting in any reported Indiana decision.”³²³ Citing a number of “factually similar cases,” and distinguishing “dramatically different” cases in which

318. For example, a defendant could seemingly raise a procedural challenge to the finding of aggravating circumstances or the failure to find mitigating circumstances, although such challenges are generally less likely to result in a reduced sentence than is a substantive challenge under Rule 7(B).

319. See generally Schumm, *supra* note 284, at 669.

320. 798 N.E.2d 852 (Ind. 2003).

321. *Id.* at 854.

322. *Id.* at 856-57.

323. *Id.* at 853, 857.

sentences had been affirmed, the court reasoned that the sentence should be reduced to ninety years in light of Serino's positive character traits and the victim's mother's recommendation at sentencing.³²⁴ Specifically, the court noted that sentences had been reduced in cases with lengthy sentences involving one victim, multiple counts of molestation, and a lack of criminal history, while sentences had been affirmed when the sentences were shorter in duration and involved multiple victims or multiple different sexual acts.³²⁵

Serino is significant not only because of its useful historical perspective but because it also explains a number of pragmatic principles that can be applied in a fairly consistent manner to future cases.³²⁶ Indeed, just weeks later the court of appeals distinguished *Serino* and upheld a 326-year sentence based on the egregious nature of the offenses, which included repeated molestation of two young victims over a period of several years by acts including bondage, violence, and threats to kill or hurt the victims, as well as the defendant's character—a father figure to the children whom he sexually abused on a weekly or even daily basis.³²⁷ There, the court applied the oft-cited principle that the maximum sentences should be reserved for the “worst offenses and offenders,” finding him to be the “proverbial ‘worst offender’ for whom maximum sentences are to be reserved.”³²⁸

In *Rose v. State*,³²⁹ the court affirmed an aggregate 135-year sentence based on the defendant's role in holding a gun while his cohort repeatedly raped and committed criminal deviate conduct against two women, one of whom was seven months pregnant, and his prior juvenile adjudications.³³⁰ The worst offense/worst offender principle did not apply because none of the sentences on the individual counts were maximum sentences.³³¹

The principle did apply and resulted in a reduced sentence in *Pagan v. State*,³³² where the eighteen-year-old defendant was sentenced to the maximum sentence of twenty years for B felony robbery.³³³ The court relied on the defendant's youthful age and non-violent nature of his delinquency/criminal history in concluding that, although an enhanced sentence would be appropriate, that sentence should be fifteen years instead of the maximum term of twenty years.³³⁴ Although it would be impossible to summarize all of the sentence

324. *Id.* at 857-58.

325. *Id.*

326. *Id.*

327. *Haddock v. State*, 800 N.E.2d 242, 289-49 (Ind. Ct. App. 2003).

328. *Id.* at 248, 249 n.8.

329. 810 N.E.2d 361 (Ind. Ct. App. 2004).

330. *Id.* at 368-69.

331. *Id.*

332. 809 N.E.2d 915 (Ind. Ct. App. 2004).

333. Four years of the sentence were suspended, but the court reiterated that it would consider suspended portions of sentences as well as executed portions when reviewing appropriateness under Rule 7(B). *See id.* at 926 n.9.

334. *Id.* at 928.

review cases from the survey period, this small sample suggests that some greater degree of consistency of principles in felony cases has solidified.

However, the court of appeals confronted and confused sentence review for misdemeanors. First, in *Ruggieri v. State*,³³⁵ the court addressed a challenge to an eighteen-month sentence imposed for two misdemeanor convictions. Although even the State had couched its argument in terms of appropriateness under Appellate Rule 7(B), the court found that argument “misplaced” and instead applied a seemingly lower standard of abuse of discretion in affirming the sentence.³³⁶

In *Gaerte v. State*,³³⁷ the court of appeals upheld a maximum sentence of 180 days for an inmate convicted of criminal mischief for breaking a window in a jail isolation cell. In reviewing his challenge to the appropriateness of his sentence pursuant to Appellate Rule 7(B), the majority suggested that it is appropriate—although not necessary—to consider aggravating and mitigating circumstances in misdemeanor sentencing, before concluding that the sentence could not be deemed inappropriate in light of Gaerte’s “lengthy criminal history.”³³⁸ Judge Sullivan dissented, however, pointing to the significance of Gaerte’s “clear expression of remorse and willingness to pay for the broken window,” and would have remanded with instructions to reduce the sentence to ninety days.³³⁹

Gaerte does not discuss the seemingly lower standard from *Ruggieri*, and both the majority and dissenting opinions acknowledge the importance of aggravating and mitigating circumstances in misdemeanor sentencing and the applicability of appellate review for appropriateness under Appellate Rule 7(B). Indeed, it is unclear why a different standard should apply in reviewing misdemeanor sentences. Article VII of the Indiana Constitution and Appellate Rule 7(B) make no mention of felonies or misdemeanors,³⁴⁰ and each presumably applies to the review of both. Although the statutory scheme for misdemeanor sentences has no presumptive (the starting point for review of felony sentences) and instead only a maximum sentence, this presents no obstacle to reviewing the “nature of the offense” and the “character of the offender” to ensure they are not “inappropriate.” Finally, considering that misdemeanor sentences may be ordered consecutively and therefore be even longer than some D felony sentences, the meaningful review provided for by Rule 7(B) is appropriate in all appeals.

335. 804 N.E.2d 859 (Ind. Ct. App. 2004).

336. *Id.* at 867.

337. 808 N.E.2d 164 (Ind. Ct. App. 2004).

338. *Id.* at 167.

339. *Id.* at 168 (Sullivan, J., concurring and dissenting).

340. Indeed, section 4 of article VII provides for sentence revision “in all appeals of criminal cases.”

ENVIRONMENTAL LAW DEVELOPMENTS: A FOCUS ON BROWNFIELDS—OVERCOMING HISTORICAL ENVIRONMENTAL PROBLEMS

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INTRODUCTION

The search for solutions to environmental problems stemming from Indiana's long industrial history was the subject of a number of significant legal developments during the survey period. Indiana appellate decisions resolved a number of important issues relating to "brownfield" cleanups.

Indiana's courts have held that general liability insurance policies issued even decades ago respond to environmental cleanup costs arising from damage which occurred when those policies were in effect. One recent decision determined that a municipality remediating a brownfield site is entitled to maintain a declaratory judgment action against the insurers of the defunct entity which caused the environmental damage. This ruling will allow cities, towns, and private developers facing brownfields problems to find out whether insurance coverage will be available at the outset, before being required to litigate an otherwise potentially pointless underlying environmental liability claim. That same decision of the Indiana Court of Appeals also found that such insurance applies to the liability of a corporate successor. Still at issue is the important question of whether the insurer of the defunct polluter remains obligated to pay, even if the policyholder has been statutorily dissolved. Developments in another case confirmed that an insurer's obligations will not be reduced by the fact that the environmental injury at issue also occurred over a number of other policy years.

In a setback for environmental quality and an increase in the burden on government regulators, the United States Supreme Court restricted the right to obtain contribution from former owners and operators for the cost of a Superfund cleanup performed under the mere threat of government enforcement. This will do nothing but force potentially responsible parties to wait for an enforcement action, delaying cleanups and forcing government to expend scarce resources securing cleanups that otherwise could proceed on a voluntary basis. However, in a case concerning liability for former gasoline stations, the Indiana Supreme Court refused to limit the scope of Indiana's underground storage tank act or the government's ability to recover any costs it expends in a cleanup. This kind of cost recovery action can help stretch government resources to clean up old contamination.

Other significant developments in Indiana law involved cases reinforcing government's power to use redevelopment zones; setting the proper scope of

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citizens' suits and citizens' objections to environmental permits; affirming the powers of solid waste management districts; and illuminating the parameters of environmental takings claims. Indiana's "good character" statute was also upheld against several constitutional challenges.

I. THE BROWNFIELDS PROBLEM

They exist in every Indiana city and town of any size and in many smaller communities. Abandoned factories, gas stations where gasoline is no longer sold, shuttered warehouses, boarded-up stores or rail yards or trucking depots—a brownfield can take many forms. They are generally eyesores, drains on the public fisc and local economy because they produce neither tax revenue nor goods or services, and very often are health and safety threats. Brownfields express the decline of urban markets and neighborhoods. Their size and composition add to the problem. Less permanent structures were more easily removed in earlier centuries when their economic utility vanished. Now, in a consumer-driven culture, these sites are simply thrown away, left to erode and rot.

The Indiana Department of Environmental Management ("IDEM") defines a brownfield as "an industrial or commercial property that is abandoned, inactive, or underutilized, on which expansion or redevelopment is complicated due to actual or perceived environmental contamination."¹ More broadly, brownfields have been defined as the opposite of "greenfields"—property that has not previously been used for commercial or industrial activities and is presumed free of contamination."²

The challenge of resurrecting brownfields is vast. An estimated 450,000 to one million brownfield sites exist nationwide.³ IDEM's Brownfields Program currently maintains a list of 269 brownfield sites in the state of Indiana that have entered the Brownfields Program for assistance.⁴ However, thousands more sites are estimated by IDEM to exist across Indiana.⁵ These former plants, factories, shops, dry cleaners, and landfills sit abandoned or underused due to uncertainty about the presence of contamination, limited cleanup resources, and fear by the sites' owners or prospective purchasers that they might be held liable for cleaning

1. IND. DEP'T OF ENVTL. MGMT., INDIANA BROWNFIELDS DEVELOPMENT RESOURCE GUIDE 7 (May 2003), available at <http://www.in.gov/idem/land/brownfields/pdffiles/guidance/resourceguide.pdf>.

2. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 5 (Todd S. Davis ed., 2d ed. 2002).

3. GOV'T ACCOUNTABILITY OFFICE, BROWNFIELD REDEVELOPMENT, STAKEHOLDERS REPORT THAT EPA'S PROGRAM HELPS TO REDEVELOP SITES, BUT ADDITIONAL MEASURES COULD COMPLEMENT AGENCY EFFORTS 1 (GAO-05-94, 2004), available at <http://www.gao.gov/new.items/d0594.pdf>.

4. IND. DEP'T OF ENVTL. MGMT., PROPOSAL FOR BROWNFIELDS ASSESSMENT GRANT, available at <http://www.in.gov/idem/land/brownfields/pdffiles/bfgrantproposal.pdf>.

5. *Id.*

them up. Remediating and redeveloping these properties can improve and protect the environment, increase local economic and tax bases, preserve historical sites and slow consumption of open land.

Government grants and loans are an important part of the solution to brownfield problems. For instance, since 1995, the U.S. Environmental Protection Agency ("EPA") has awarded over 1200 brownfield grants totaling \$400 million to state and local governments and quasi-governmental entities.⁶ In addition, clarification of ambiguous legal liabilities can be a significant aid to private brownfields redevelopment. As an example, the Lender Liability and Deposit Insurance Protection Act of 1996 has allowed banks to more easily finance redevelopment of brownfield properties with little risk of incurring environmental liability.⁷ Indiana's Voluntary Remediation Program,⁸ with its provision of a covenant not to sue, flexible actual risk-based cleanup standards,⁹ and provisions of "no further action" letters¹⁰ all can assist in returning such properties to productive use. Much has been written about these traditional approaches to brownfields problems.¹¹

It is not clear, however, that despite noticeable individual successes,¹² we are reducing brownfields even as fast as they are being created. The crux of the problem is economic, on several levels. First, cleaning up a contaminated site does not guarantee that it will find an economically useful function. To be viable, the investment has to make economic sense: to be able to return a satisfactory yield on the investment needed. In some cases, the return may need to be broadly defined, and may warrant some degree of public subsidization. All the citizens of a city or town may benefit from the removal of an abandoned factory, even if public "green space" is the only viable next use.

The second economic problem presented by brownfields is less obvious but even more challenging. The classical market model is distorted because a separation of benefits and burdens has occurred. A brownfield passes burdens

6. *Id.*

7. See 42 U.S.C.A. § 9601(20)(F) (West, WESTLAW through 2002 legislation) (codifying EPA's lender liability rules and addressing the CERCLA liability of fiduciaries, including trustees).

8. IND. CODE § 13-25-5 (2004).

9. IDEM, RISK INTEGRATED SYSTEM OF CLOSURE, USERS GUIDE 1-1, 4-3 (2001) [hereinafter RISC USER'S GUIDE], available at <http://www.in.gov/idem/land/risc/userguide/riscuserguide.pdf>.

10. *Id.* at 1-3 (discussing the Leaking Underground Storage Tank ("LUST") Program).

11. See, e.g., Davis, *supra* note 2.

12. See, e.g., IND. DEP'T OF ENVTL. MGMT., BAIRSTOW SLAG DUMP (Apr. 8, 2003), available at <http://www.in.gov/idem/land/brownfields/ssstories/bairstowslagdump.pdf> (documenting the former Bairstow Slag Dump in Hammond, Indiana where a property covered with millions of tons of stockpiled steel-mill slag has been converted into a golf course development); Ind. Dep't of Env'tl. Mgmt., *Former Uniroyal Mishawaka, St. Joseph County*, at <http://www.in.gov/idem/land/brownfields/ssstories/uniroyal.html> (last revised Nov. 8, 2000) (recounting the transition of the former Uniroyal Property in downtown Mishawaka, Indiana where a 1.7 million square foot, forty-two acre, former factory has been remediated, demolished, and readied for redevelopment following 114 years of continuous industrial use).

to later generations of citizens that were not borne by those who reaped the benefits of the properties' prior uses. The shareholders and customers of the long-defunct Studebaker Corporation ("Studebaker"), the former automaker, for example, made profits and used goods obtained at much less than the true costs of production. The cost of removing the contaminants that render the abandoned Studebaker auto plant in South Bend unusable should have been passed along with the benefits, but that does not happen automatically, and often not at all. In brownfields, the present is asked to subsidize the past for the benefit of the future. This probably explains why our tax revenue allocation to attack the brownfields problem is so small relative to the task; \$400 million over ten years is a pittance relative to other federal spending. It also points the way to why cost shifting actions, which seek to more closely align costs and benefits, more likely hold the key to brownfields progress.

Two such important pieces of the brownfields puzzle are receiving increasing attention in Indiana: insurance and private cost recovery. Should the liability insurers for defunct entities which caused environmental problems be liable for property damage which occurred during their policy periods? Or does the insolvency or bankruptcy of their policyholder absolve the insurers of responsibility? Also, should the legal successors to former entities which caused environmental problems be permitted to walk away from the damage caused by their predecessors? Or would allowing them to do so provide their shareholders an unearned benefit at the expense of the taxpayers of the communities left to deal with the problems left behind? Answers to questions like these may help convert brownfields sites from eyesores to manageable projects with a reasonable chance of economic revitalization.

The answers should be framed on this economic framework. Full costs should be aligned with benefits whenever this is possible. There is no moral or legal justification, for example, for allowing insurers or successors to defunct corporations to enjoy a windfall at public expense by rigid application of a corporate dissolution statute.

II. RECENT DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW— THE LIABILITIES OF FORMER INSURERS FOR BROWNFIELD CLEANUPS

A. Declaratory Actions Against Insurers of Dissolved Companies

Typically, when municipalities face the problem of abandoned and tax delinquent properties, the former owners that caused the contamination are bankrupt or insolvent. Often, however, the industries which caused the environmental property damage purchased liability insurance that would provide for the cleanup of these sites if the companies that purchased them were still in business. But is that also true when the entity which purchased the policies is no longer in business in the form in which it was insured? The Indiana Court of Appeals confronted this problem in a recent case.

The City of South Bend has undertaken a significant brownfields project, the remediation and redevelopment of the former Studebaker manufacturing

facilities.¹³ Beginning in the 1850s, Studebaker manufactured first wagons and then automobiles in the City of South Bend.¹⁴ Studebaker's facilities in the City ultimately covered 104 acres and approximately 3.65 million square feet under roof.¹⁵ Studebaker discontinued manufacturing automobiles in December 1963.¹⁶ Following Studebaker's diversification into other lines of business and divestiture of its automotive facilities in the city, the facilities were used for a variety of other, less economically vibrant purposes.¹⁷ Through its efforts to revitalize this vast downtown area, the City has become the owner of significant portions of the former Studebaker facilities.¹⁸ Environmental testing of the former Studebaker facilities has determined that there have been significant environmental releases impacting the soil and groundwater at those facilities and surrounding areas.¹⁹

The City of South Bend asserted claims under the general liability policies purchased by Studebaker between 1949 and 1963.²⁰ The City sought a declaratory judgment that the Insurers, subject to their respective policy limits, are obligated to provide insurance coverage for Studebaker's environmental liabilities.²¹ The Insurers filed motions to dismiss based on the "direct action" rule,²² which the trial court granted. The trial court found that the City's declaratory judgment action against the Insurers:

is barred by the direct action rule and falls outside the limited exception [to that rule] created by the courts in *Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mut. Ins. Co.*, 708 N.E.2d 882 (Ind.Ct.App.1999) and *Wilson [v. Continental Cas. Co.]*, 778 N.E.2d 849 (Ind.Ct.App.2002). Without any dispute between the parties to the insurance contract as to the rights and obligations deriving thereunder, the exception to the direct action rule does not apply.²³

South Bend appealed. The appeal attracted significant public attention: the cities of Indianapolis, Fort Wayne, Gary, Mishawaka, and Jeffersonville, Indiana

13. The authors represent South Bend in this litigation.

14. *City of South Bend v. Century Indem. Co.*, 821 N.E.2d 5, 7 (Ind. Ct. App. 2005).

15. *Id.*

16. *Id.*

17. *Id.* at 8.

18. *Id.*

19. *Id.*

20. *Id.* The Insurers are Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies, Century Indemnity Company, and Zurich American Insurance Company. *Id.* at 7.

21. *Id.* at 8.

22. *Id.* The direct action rule generally bars injured plaintiffs from bringing an action directly against the insurers of the defendant seeking payment under those policies. See *Menefee v. Schurr*, 751 N.E.2d 757, 761 (Ind. Ct. App. 2001), *trans. denied*, 774 N.E.2d 511 (Ind. 2002), regarding the scope of the direct action rule.

23. *City of South Bend*, 821 N.E.2d at 9 (quoting Appellants' Appendix at 35).

appeared as *amici curiae* aligned with South Bend. The Complex Insurance Claims Litigation Association, Insurance Institute of Indiana, and Property Casualty Insurers Association of America aligned with the Insurers.²⁴

South Bend sought damages against McGraw-Edison Company ("McGraw-Edison") as the successor to Studebaker.²⁵ In October 1967, Studebaker had combined with Worthington Corporation to form a new company, Studebaker-Worthington, Inc. ("Studebaker-Worthington").²⁶ As part of that transaction, Studebaker reincorporated under a new name and transferred its assets and business to a wholly-owned subsidiary of Studebaker-Worthington Inc.²⁷ The wholly-owned subsidiary assumed "all of the liabilities and obligations of [Studebaker] existing on [November 22, 1967]."²⁸ In 1968, the entity formerly known as Studebaker Corporation sent a notice to creditors advising that its corporate existence terminated in November 1967 and that substantially all of its assets had been transferred to a wholly-owned subsidiary of Studebaker-Worthington, Inc. in a tax-free "reorganization" under which substantially all of the liabilities of the Corporation were assumed by the wholly-owned subsidiary.²⁹ Studebaker-Worthington later combined with McGraw-Edison in a corporate merger.³⁰

24. *Id.* at 8 n.3. The City of Warsaw joined the other cities in the appeal at the Indiana Supreme Court level.

25. *Id.* at 8.

26. *Id.* at 7.

27. *Id.* at 7-8.

28. *Id.* (quoting Appellants' App. at 900).

29. *Id.* In subsequent proceedings, South Bend has presented other evidence which establishes the succession through time of Studebaker's liabilities to Studebaker-Worthington to McGraw-Edison. This includes the Instrument of Assumption of Liabilities and Obligations, whereby the new corporation agreed to assume Studebaker's liabilities "of any kind, character, or description, whether accrued absolute, contingent, or otherwise and whether or not reflected in the records of Old Studebaker"; repeated references in Studebaker-Worthington's annual reports to the combination of Studebaker and Worthington Corporation as a "merger"; a successful attempt by Studebaker-Worthington in the 1970s to receive tax deductions for pre-1967 operating losses attributable to Studebaker, *see Chilivis v. Studebaker-Worthington, Inc.*, 223 S.E.2d 747, 751 (Ga. Ct. App. 1976); a claim in the 1980s by a subsidiary of McGraw-Edison to obtain a pre-1967 tax deduction as a result of a loss of goodwill originating with the formation of Studebaker in 1911 because of Studebaker's cessation of automobile manufacture, *see Edison Int'l, Inc. (formerly Studebaker-Worthington, Inc.) v. United States*, 10 Cl. Ct. 287, 288 (Ct. Cl. 1986); a lawsuit filed in the 1990s by McGraw-Edison's corporate parent, Cooper Industries, Inc., to obtain insurance coverage as the successor to Worthington Corporation, which became part of Studebaker-Worthington on exactly the same terms as Studebaker did; and the fact that McGraw-Edison has paid, and its corporate parent continues to pay, the pensions of certain former Studebaker employees who retired years prior to the 1967 transaction, including prior to 1963.

30. *City of South Bend*, 821 N.E.2d at 7-8. In 1979 the liabilities of Studebaker Corporation became the liabilities of McGraw-Edison Company as a result of the merger between Studebaker-Worthington and McGraw-Edison, a transaction in which McGraw-Edison, through a

The principal issue in *City of South Bend v. Century Indemnity Co.* was whether South Bend's claims against the Insurers ran afoul of the "direct action" rule.³¹ South Bend argued that its case was a declaratory judgment action—not an impermissible direct action—like those the Indiana Court of Appeals had allowed in *Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mutual Insurance Co.*,³² and *Wilson v. Continental Casualty Co.*³³ The Indiana Court of Appeals agreed with South Bend, finding that "[t]he City is not seeking any direct recompense from the Insurers; it is only seeking a declaration that, if it were to prove its underlying case, the Insurers would be obligated to provide coverage under the previously-issued policies."³⁴ The court gave particular consideration to the fact that "the original insured, Studebaker, no longer exists, and its alleged successor, McGraw-Edison, has not pursued insurance coverage for this action,"³⁵ and stated that "the City's declaratory judgment action may be the only means by which a determination of insurance coverage can be made."³⁶

The insurers have sought transfer on this issue. In *Community Action*, in which the insurers had denied coverage, transfer was denied.³⁷ In *Wilson*, in which the insurer was defending under a reservation of rights, transfer was granted, but dismissed at the parties' request once a settlement was reached.³⁸ Here, when as a practical matter no policyholder exists to make a claim to the insurers—McGraw-Edison because it does not want to exercise control which would suggest successor authority and Studebaker because it no longer is a going concern—the need for and usefulness of declaratory relief is especially strong.

The benefits of such relief are plain. As Judge Mathias put it in *Wilson*:

We believe that allowing such declaratory actions will prevent the waste of parties' and judicial resources. All litigants will now be on the same footing in cases where insurance companies either deny coverage or defend under a reservation of rights. Equal ability to know whether a provable loss is subject to insurance indemnification will be a positive step toward settlement and will make litigation outcomes dispositive, collectible and credible. We believe Indiana's civil litigants deserve no less.³⁹

subsidiary, assumed all of the obligations and liabilities of Studebaker-Worthington. In 1985, Cooper Industries, Inc. acquired McGraw-Edison, which it merged into one of its subsidiaries and renamed McGraw-Edison.

31. *Id.* at 9-13.

32. 708 N.E.2d 882 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 305 (Ind. 1999).

33. 778 N.E.2d 849 (Ind. Ct. App. 2002), *trans. dismissed*, 792 N.E.2d 44 (Ind. 2003).

34. *City of South Bend*, 821 N.E.2d at 11.

35. *Id.* McGraw-Edison did not pursue the insurance coverage for fear it would be regarded as an indication of its successorship to Studebaker's liabilities, as well as its rights.

36. *Id.*

37. 726 N.E.2d at 305.

38. 792 N.E.2d at 44.

39. *Wilson*, 778 N.E.2d at 852 (emphasis added).

In a second issue of particular importance to brownfield cleanups, the Insurers and McGraw-Edison alleged that there is no environmental liability to be covered by insurance because claims against Studebaker were barred as of approximately 1971 under a three-year Michigan statute of limitation for filing claims after a published notice of dissolution.⁴⁰ The court rejected the Insurers' and McGraw-Edison's contention as moot in light of South Bend's claim that McGraw-Edison is the successor to Studebaker's assets, including the insurance policies with the Insurers, as well as all of Studebaker's liabilities existing as of the date of Studebaker's dissolution.⁴¹ It held that although "the company itself [Studebaker] does not continue to exist, its assets and liabilities may."⁴²

A third important issue addressed by the Indiana Court of Appeals in a subsequent decision on a petition for rehearing is whether an "insolvency or bankruptcy" statute, Indiana Code section 27-1-13-7, supports South Bend's declaratory judgment action even in the absence of a judgment against McGraw-Edison.⁴³ By statute, it is the public policy of Indiana that

[n]o policy of insurance . . . shall be issued or delivered in this state . . . unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person or persons insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy.⁴⁴

This statute is intended to protect victims by insuring that a tortfeasor's insurance

40. *City of South Bend*, 821 N.E.2d at 11-12 (citing MICH. COMP. LAWS § 450.75 (1953)). Hallpark Enterprises, Inc., formerly known as Studebaker Corporation, was a Michigan corporation.

41. *Id.* at 13.

42. *Id.*

43. *City of South Bend v. Century Indem. Co.*, 824 N.E.2d 794 (Ind. Ct. App. 2005). The Indiana Court of Appeals, sua sponte, found additional support in this opinion for its original decision on the direct action issue. *Id.* at 795 n.1.

With respect to direct actions, we note that on January 6, 2005, nearly two weeks before this opinion was handed down, a bill was introduced in the Indiana House of Representatives by Representative Torr which would amend Indiana Code section 34-14-1-2 to add the following section

(b) In an action against an insurer, only a:

(1) named insured; or (2) person seeking status as an insured under the terms of the insurance contract; may bring an action for declaration of coverage before judgment has been entered on the underlying claim.

Representative Torr is also an insurance adjuster, and as such, insurance is an area within his particular expertise. This proposed amendment would indicate that as of January 6, 2005, the state of the law was that a declaratory judgment action by a third party was not a direct action.

Id. (citations omitted).

44. IND. CODE § 27-1-13-7 (2004). This provision has been part of Indiana law since 1935. See Indiana Insurance Law, § 177, 1935 Ind. Acts 162.

remains to answer even if the tortfeasor is insolvent or bankrupt.

The court of appeals disagreed, finding that without a claim against the successor, McGraw-Edison, South Bend would be barred by the Michigan corporation dissolution three-year statute of limitations in effect at the time.⁴⁵ The court of appeals gave two reasons for its holding, in a single paragraph.⁴⁶ First, it noted that another statute—the receivership statute, Indiana Code section 27-1-13-7—uses *both* the words “dissolution” and “insolvency.” Indiana Code section 32-30-5-1(5) declares a receiver may be appointed “[w]hen a corporation: (A) has been dissolved; (B) is insolvent; (C) is in imminent danger of insolvency; or (D) has forfeited its rights.” This shows, the Court of Appeals found, that “the legislature has not, in other statutes, used the terms ‘insolvency’ and ‘dissolution’ interchangeably.”⁴⁷ Second, the court of appeals concluded that application of the “insolvency or bankruptcy” statute requires liability on the part of the insured. It stated that a finding of liability against Studebaker was impossible because of Studebaker’s dissolution.⁴⁸

South Bend has filed a petition to transfer. Applying the “insolvency or bankruptcy” statute here to prevent a forfeiture of insurance squares perfectly with the statute’s purpose⁴⁹ and with the interpretation of other states’ “insolvency or bankruptcy” statutes.⁵⁰ The court of appeals’ construction of the

45. MICH. COMP. LAWS § 450.75 (1953).

46. *City of South Bend*, 824 N.E.2d at 796 (quoting IND. CODE § 32-30-5-1(5)).

47. *Id.*

48. *Id.*

49. Courts construing this statute have eloquently articulated its purpose: “[i]t is obvious that the statute was enacted, not for the protection of the insurer but for the protection of the injured third party and the insured himself. Otherwise the financial responsibility laws enacted for the protection of the public would be rendered nugatory by the insertion in the policy of a clause relieving the insurer from liability where the insured is insolvent or bankrupt and thus leaving the injured third party remediless.” *Barker v. Sumney*, 185 F. Supp. 298, 301 (N.D. Ind. 1960). *See also* *Merchants Mut. Auto. Liab. Ins. Co. v. Smart*, 267 U.S. 126, 129-30 (1925) (finding that New York’s similar statute was enacted to protect “the public, whose lives and limbs are exposed” in order to vest rights in victims at no expense to a destitute injurer or his or her creditors).

50. *See, e.g.,* *Penasquitos, Inc. v. Superior Court*, 812 P.2d 154 (Cal. 1991) (determining California’s “bankruptcy or insolvency” statute required that “if the corporation has liability insurance coverage, its dissolution provides no reason to excuse the insurer from defending the action and indemnifying those injured by the predissolution activities of its insured, just as a corporation’s insolvency or bankruptcy does not release its insurer from payment for damages the corporation has caused”); *Westoil Terminals Co. v. Harbor Ins. Co.*, 86 Cal. Rptr. 2d 636, 641 (Cal. Ct. App. 1999) (allowing a dissolved company which had changed from a corporation to a limited partnership to bring suit against the former corporation’s insurers even if the policies were not transferred to the partnership, based on that state’s “insolvency or bankruptcy” statute); *Home Ins. Co. of Ill. v. Hooper*, 691 N.E.2d 65, 69-70 (Ill. 1998) (finding a policy provision requiring a bankrupt insured’s actual payment of a self-insured retention as a condition precedent to payment to a tort victim violated the public policy expressed in the Illinois “insolvency or bankruptcy” statute, which “makes clear the legislative intent to prevent insurers from using the insured’s

claims bar statute⁵¹ unnecessarily brings it into conflict with the insurance “insolvency or bankruptcy” statute⁵² and would create a significant problem for those seeking to remedy brownfields problems. The purpose of a dissolution statute is to resolve claims when a corporation goes out of business and thus allow an orderly distribution of any assets remaining to the corporation’s owners after all claims are satisfied.⁵³ The directors, officers and shareholders face no peril in an action solely upon insurance coverage for injuries caused by the corporation. There is no basis for distinguishing dissolution from insolvency. The legislature’s use of two terms in a statute is not a sound basis for concluding the terms have entirely distinct meanings. The terms “insolvent” and “bankrupt,” for example, in Indiana Code section 27-1-13-7, overlap. They are not defined in the statute. In dictionaries, they mean the same thing.⁵⁴ In the receivership

bankrupt condition and resulting inability to make actual payment to satisfy a judgment or any portion thereof as grounds to avoid payment on a policy”); *In re Babcock & Wilcox Co.*, No. CIV.A. 01-912, No. CIV.A. 01-1187, 2001 WL 1095031 (E.D. La. Sep. 18, 2001) (allowing intervention against the debtor’s insurers in a bankruptcy proceeding citing Louisiana’s “insolvency or bankruptcy” statute); *Roman v. Hudson Tel. Assocs.*, 784 N.Y.S.2d 484 (App. Div. 2004) (reasoning New York’s “insolvency or bankruptcy” statute required that a post-discharge claim asserted for sole purpose of establishing the liability of a defendant’s insurer was not barred by the debtor’s discharge in bankruptcy).

51. MICH COMP. LAWS § 450.75 (1953).

52. IND. CODE § 27-1-13-7 (2004). Courts should avoid conflicts between statutes where possible and give effect to all of Indiana’s laws. *Citizens Action Coalition of Ind., Inc. v. Pub. Serv. Comm’n of Ind.*, 425 N.E.2d 178, 184 (Ind. Ct. App. 1981) (“In instances where the two acts deal with the same particular subject, the statutes must be examined carefully and harmonized if possible.”).

53. The purpose behind Indiana’s dissolution statute is made explicit by the official comments to that provision: the “concern of exposing directors, officers and shareholders of the dissolving corporation to uncertain liability for a protracted period.” Indiana Code section 27-1-17-5 provides that “[a]fter their publication, the comments may be consulted by the courts to determine the underlying reasons, purposes and policies of this article and may be used as a guide in its construction and application.” See also *Lovold Co. v. Galyan’s of Brownsburg, Inc.*, 764 N.E.2d 281, 286 (Ind. Ct. App. 2002) (stating that the purpose of the dissolution statute is “to shield officers and owners of the corporation from uncertain or unlimited liability”).

54. See, e.g., WEBSTER’S NEW COLLEGIATE DICTIONARY 129 (9th ed. 1988) (defining bankrupt as “a person who becomes insolvent”); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 141 (4th ed. 2000) (defining bankrupt as “[h]aving been legally declared financially insolvent”). All the words here—insolvency, dissolution, bankruptcy—are to a large measure interchangeable. For example, “dissolution” and “solvency” share a common Latin etymology. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 523 (4th ed. 2000) (“From Latin *dissolvere*: *dis-*, *dis-* + *solvere*, to release”). If an entity is “dissolved” or “insolvent,” a creditor’s grip has been weakened or released. A “solvent” is something “having the power of dissolving. . . .” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1356 (1973). Other words share this root and a common theme of release or loosening: absolve, dissolute, dissolution, indissoluble, insoluble, resolution.

statute, “dissolved” and “insolvent” are treated identically; both are a status (like bankruptcy) warranting use of a receiver to protect creditors.⁵⁵ Other, more pertinent, insurance statutes use “dissolution” and “insolvency” interchangeably.⁵⁶ A number of courts have treated dissolution the same as insolvency.⁵⁷ The very point of Indiana Code section 27-1-13-7 is that it is not necessary for a judgment to be entered capable of being executed against someone other than the insurers.⁵⁸

Often such insurance is all that is left behind. It seems irrational and unfair that whether or not liability insurance can be available to help pay for a cleanup would depend upon whether the policyholder went through dissolution proceedings.

55. In bankruptcy, the receiver’s function is discharged by a statutory creation, the trustee.

56. For instance, Indiana Code section 27-9-3-9 states that dissolution as a matter of law occurs when an insurer is insolvent: “If the dissolution [of a domestic insurer] has not previously been ordered [by the commissioner], the dissolution shall be effected by operation of law upon the discharge of the liquidator if the insurer is insolvent. . . .” IND. CODE § 27-9-3-9.

57. In *James Talcott, Inc. v. Crown Industries, Inc.*, 323 So.2d 311, 314 (Fla. 1975), the court, in interpreting a Florida transfer statute, held that the test of insolvency is “whether the corporation has a general inability to answer in the course of business the liabilities existing and capable of being enforced.” That court further held that “once the decisions had been made to liquidate the corporation and wind up its business, then the corporation was insolvent within the meaning of the statute.” *Id.* See also *Cardozo v. Brooklyn Trust Co.*, 228 F. 333, 334 (2d Cir. 1915) (payment made “with winding-up as an impending fact” is “made in contemplation of insolvency”); *Central States v. Minneapolis Van & Warehouse*, 764 F. Supp. 1289, 1294 n.8 (N.D. Ill. 1991) (“a corporation that distributes all its assets in the course of dissolution is rendered insolvent (by definition) by the very act of distribution if it turns out that all of the corporation’s obligations have not been paid or provided for”).

58. A liability judgment is not required for the statute to apply. In *Barker*, the injured party had entered a “covenant not to execute” with the policyholder which limited its ability to collect to recoveries from the insurer. *Barker*, 185 F. Supp. at 299-300. The insurer in *Barker* pointed out that Section 39-4309 of Burns Indiana Statutes, now Indiana Code section 27-1-13-7, allowed an injured party to recover from an insolvent defendant’s insurer if a levy of execution against the insolvent defendant first had been returned “unsatisfied.” Due to the covenant, the insurer claimed, no such judgment and return was possible. *Id.* at 300-01. The court did not agree this rendered the statute inapplicable:

A reading of the statute fails to support the defendant’s position that as a condition precedent to the execution against the defendant’s insurer of any possible judgment obtained against the defendant the plaintiff must first return an unsatisfied execution against the defendant himself. The portion of the statute pertinent here requires only that an insurance policy issued or delivered in Indiana provide for the right of an injured third party to bring an action against the insurer of the insolvent or bankrupt tort-feasor where an execution has been returned unsatisfied. It does not, however, provide the reverse to be true, that is, that an execution must be returned unsatisfied before suit can be brought against the tort-feasor’s insurer.

Id.

B. Allocation Among Successive Former Insurers

Allocation among insurers is a crucial issue in brownfields cleanups. This is a result of the uncertain nature of the timing of releases in the distant past at these properties as well as the long time lag between such releases and their discovery. These problems are exacerbated by the difficulty in locating old insurance policies and the likelihood that some of the insurers which covered the risk have become insolvent over the years. The insurance industry's view of the allocation issue is that insurers should be responsible solely for the fraction of the cleanup costs attributable to damage which occurred solely during their policy period. Policyholders and entities standing in their shoes performing brownfields cleanups point to the fact there is no language in standard insurance policies that provides for a reduction of the insurers' liability if an injury occurs only in part during the policy period.

In *Allstate Insurance Co. v. Dana Corp.*,⁵⁹ the Indiana Supreme Court resolved these questions. It held that a policyholder facing a loss which arises from an occurrence spanning more than one policy period is permitted by the "all sums" language commonly found in broad form liability policies to select which policy should respond.⁶⁰ An insurer is obligated to indemnify its policyholder for the entire liability caused by an occurrence triggering the policy, not merely for a prorated portion of the damages.⁶¹ This is very helpful in brownfields matters because cities often are unable to locate all of a defunct business's policies. Under *Dana*, one or two policies may be enough to provide sufficient cleanup dollars.

However, in a subsequent case, *Federated Rural Electric Insurance Exchange v. National Farmers Union Property & Casualty Co.*,⁶² the Indiana Court of Appeals erroneously described *Dana*'s "all sums" rule, suggesting it somehow is limited to insurers in the same policy period (sometimes called "vertical allocation") and that the policyholder may not select among triggered policies "horizontally" across many years.⁶³ The *Federated Rural* case involved stray voltage from transmission lines that injured dairy cattle and decreased milk production over several years.⁶⁴ *Federated Rural* suggested that *Dana* did not apply to insurers in successive years for claims which trigger policies over a

59. 759 N.E.2d 1049 (Ind. 2001).

60. *Id.* at 1057-58.

61. Such policies typically provide that the insurer will pay "all sums" for which a policyholder becomes liable arising out of an "occurrence," which is usually defined as an "accident" which results in property damage or bodily injury during the policy period. Nowhere do such policies say all the damage or injury must take place in the policy period, or that they will pay only for damage related only to the injury taking place in the policy period. *Id.*

62. 805 N.E.2d 456 (Ind. Ct. App.), *vacated*, 816 N.E.2d 1157 (Ind. 2004).

63. *Id.* at 467.

64. *Id.* at 461.

number of years.⁶⁵ It also concluded that *Dana* did not require any insurer whose policy is triggered to pay a policyholder “all sums” except in the same policy period, and that a policyholder may not select among triggered policies which policy shall respond to the claim.⁶⁶ The court of appeals’s descriptive mistakes likely stemmed from a conflation of the “all sums” ruling in *Dana*, which applied to all of Dana Corp.’s claims,⁶⁷ with *Dana*’s discussion of trigger and allocation as to one claim at a particular site.⁶⁸

Federated Rural filed a petition to transfer, which the Indiana Supreme Court granted.⁶⁹ The supreme court’s grant of the petition thereby vacated the court of appeals’ decision pursuant to Indiana Appellate Rule 58(A). After the supreme court granted transfer but before the court issued an opinion, the parties settled and requested that the court dismiss the appeal. The court dismissed the appeal, but specifically noted that “the Court of Appeals decision remains vacated.”⁷⁰

Thus, Indiana law remains as it was before *Federated Rural*. *Dana* controls the allocation issue. Under a standard-form “all sums” insuring agreement, an insurer which agrees to indemnify its policyholder for all sums that the policyholder becomes obligated to pay as damages is jointly and severally liable for the entire amount of the policyholder’s loss, up to any applicable policy limits,⁷¹ even if some injury or damage took place outside the policy period. As a result, the policyholder may elect any or all triggered policies under which to claim coverage.⁷²

65. *Id.* at 466.

66. *Id.*

67. *Dana Corp.*, 759 N.E.2d at 1058.

68. *Id.* at 1052.

69. 822 N.E.2d 973 (Ind. 2004).

70. 816 N.E.2d 1157 (Ind. 2004).

71. *Dana Corp.*, 759 N.E.2d at 1061.

72. In an additional insurance coverage decision during the survey period, the Seventh Circuit required application of certain arbitration clauses in a coverage dispute, which may complicate resolution of multi-insurer “long tail” claims. In *Reliance Insurance Co. v. Raybestos Products Co.*, 382 F.3d 676 (7th Cir. 2004), two of the four insurers involved had included an arbitration clause in their policies. The policyholder confronted a PCB cleanup arising from discharges over many years. The policyholder opposed arbitration and the district court denied the two insurers’ requests due to the danger of possible inconsistent results as between arbitration and litigation against the remaining insurers. For example, both a judge and an arbitrator could find coverage under the terms of the policies in each proceeding, but both also could determine that the property damage occurred during the other proceedings insurers’ policy periods. The result: two findings of coverage, but no money for the policyholder. Despite acknowledging potentially inconsistent results, the court held that concern must yield to the broad policy encouraging arbitration in the Federal Arbitration Act. 9 U.S.C. §§ 1-307; *Reliance*, 382 F.3d at 679-80.

III. RECENT DEVELOPMENTS UNDER CERCLA—CHANGING RULES FOR OBTAINING CONTRIBUTION FROM FORMER OWNERS AND OPERATORS

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, the United States Supreme Court ruled that a party performing a cleanup may seek CERCLA section 113(f)(1) contribution only if it was a defendant in a CERCLA section 106 or section 107(a) civil action or if the party had previously resolved its liability to federal or state regulators in an administrative or judicially approved settlement.⁷³ Absent a formal agreement with state or federal regulators that settles liability, costs incurred by a private party under the mere threat of enforcement or in performing a “voluntary” cleanup are not recoverable in a CERCLA contribution action.⁷⁴ The decision, which reversed longstanding contribution practice in many circuits,⁷⁵ will have the adverse effect of discouraging potentially responsible parties from performing cleanups without first requiring environmental regulatory entities to file an enforcement action. Absent a more adversarial approach to government enforcement, *Aviall* calls into question whether a party performing the cleanup will be able to recover cleanup costs from other responsible parties.

Cooper Industries, Inc., owned four Texas properties until 1981, when it sold them to Aviall Services, Inc.⁷⁶ After operating the four sites for a number of years, “Aviall discovered that both it and Cooper had contaminated them when petroleum and hazardous substances leaked into the ground and ground water through underground storage tanks and spills.”⁷⁷ Aviall sent notification to the Texas Natural Resource Conservation Commission of the contamination.⁷⁸ “The Commission informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and threatened to pursue an enforcement action if Aviall failed to undertake remediation. Neither the Commission nor the EPA, however, took judicial or administrative measures to compel cleanup.”⁷⁹ Aviall cleaned up the properties under the State’s supervision and sold them to a third party, but remained contractually responsible for \$5 million or more in cleanup costs. Aviall filed an action against Cooper to recover its environmental

73. 125 S. Ct. 577, 580 (2004). This is the same Cooper Industries, Inc. discussed *supra* in connection with the *South Bend* case, but the matters are unrelated.

74. *Id.* at 583.

75. See *Cadillac Fairview/Cal. Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1024 (9th Cir. 2002); *Morrison Enter. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002); *Kalamazoo River Study Group v. Rockwell Int’l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001); *Crofton Ventures Ltd. P’ship v. G & H P’ship*, 258 F.3d 292, 294 (4th Cir. 2001); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998); *Control Data Corp. v. SCSC Corp.*, 53 F.3d 930, 932-33 (8th Cir. 1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989).

76. *Aviall*, 125 S. Ct. at 582.

77. *Id.*

78. *Id.*

79. *Id.*

cleanup costs.⁸⁰ *Aviall* asserted a claim pursuant to CERCLA section 113(f)(1), seeking contribution from Cooper as a potentially responsible party (PRP) under section 107(a).⁸¹

The Supreme Court held that a private party who has not been sued under CERCLA section 106 or section 107(a) may not obtain contribution under section 113(f)(1) from other liable parties.⁸² The enabling clause that establishes the right of contribution provides: "Any person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title."⁸³ The Court found that this provision must be read to mean "that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."⁸⁴ The Court declined to address *Aviall*'s claim that it may recover costs under section 107(a)(4)(B) even though it is a PRP. The matter had not been briefed or decided by courts below.⁸⁵

Aviall unfortunately should foster a new era of non-cooperation between government regulators and private parties. However, it ought to have no impact upon state law claims under the Indiana Environmental Legal Action Statute ("IELA").⁸⁶ While Indiana courts have generally applied case law construing the provisions of CERCLA to this statute, the "during or following any civil action" provision at issue in *Aviall* has no parallel in the Indiana statute.⁸⁷

80. *Id.*

81. *Id.*

82. *Id.* at 583. In addition, while the Court purported to demure with respect to whether *Aviall* had an "implied right to contribution" under section 107, it strongly suggested that such claims would, likewise, only be valid if asserted during or following civil actions. *Id.*

83. 42 U.S.C. § 9613(f)(1) (2000).

84. *Aviall*, 125 S. Ct. at 583.

85. *Id.* at 584.

86. IND. CODE §§ 13-30-9-1 to -8 (2004).

87. The Indiana Supreme Court and federal courts interpreting Indiana law have, in other respects, equated the IELA and a similar statute, the Indiana Underground Storage Tank statute, to the liability scheme of CERCLA in several cases. In *Bourbon Mini-Mart v. Gast Fuel & Service, Inc.*, 783 N.E.2d 253 (Ind. 2003), the Indiana Supreme Court compared the liability measures of Indiana's Underground Storage Tank statute to that of CERCLA, in that both encourage voluntary cleanups by allowing the party that initiates corrective action to seek reimbursement from any other owner or operator, regardless of fault. Likewise, the U.S. District Court for the Southern District of Indiana in several decisions has likened the IELA to CERCLA. See *Taylor Farms LLC v. Viacom*, 234 F. Supp. 2d 950, 962 (S.D. Ind. 2002) (stating that like CERCLA, the purpose of the IELA is to recover the reasonable costs of a removal or remedial action); *Northstar Partners v. S & S Consultants*, 2004 WL 963706, at *8 (S.D. Ind. Mar. 31, 2004) (holding that the IELA is a supplemental state law cause of action closely resembling the cost recovery of CERCLA). The court in *Taylor Farms* also expressly equated a claim under the IELA to a CERCLA Section 107(a) claim. *Taylor Farms*, 234 F. Supp. 2d at 962. The Southern District of Indiana recently reiterated its position in *Commercial Logistics Corp. v. ACF Indiana*, No. 4:04CV00074-SEB-WGH, 2004 WL 2595880, at *3 (S.D. Ind. Nov. 10, 2004), in which the court stated that interpretation of the IELA is aided by analyzing CERCLA.

IV. OTHER RECENT DEVELOPMENTS IN INDIANA ENVIRONMENTAL LAW

A. Cleanups of Old Gasoline Stations—Bourbon Mini-Mart and the Excess Liability Trust Fund

In contrast to the U.S. Supreme Court's limitation of remedies in *Aviall*, the Indiana Court of Appeals rejected attempts to limit the scope of Indiana's Underground Storage Tank Act ("UST"),⁸⁸ at least as wielded by government. In *Bourbon Mini-Mart, Inc. v. Indiana Department of Environmental Management*⁸⁹ the court held that the UST statute allows IDEM to seek recovery of its costs in investigating and cleaning up a gas station spill where the operator ("Mini-Mart") refused to conduct the cleanup.⁹⁰ The litigation over this site has been substantial. Mini-Mart previously had lost a claim by an adjacent landowner against Mini-Mart⁹¹ and its own contribution claim against others that Mini-Mart alleged had contributed to the contamination.⁹²

The court of appeals rejected all of Mini-Mart's appeals as to the trial court's entry of summary judgment in favor of IDEM. These included Mini-Mart's claim that all four of the criteria of Indiana Code section 13-7-20-19(b)(1)-(4) need to exist before IDEM can undertake corrective action. The court, looking to the Act's remedial purpose, and its use of "or" between sections (3) and (4) concluded that the presence of any one of the four criteria authorized IDEM to act. The court disagreed with Mini-Mart's contention that a 1996 statutory revision changed the statute, since the amending act specifically discounted any intent to change it.⁹³ The Court found adequate evidence to support at least one of the four criteria—potentially dangerous conditions—necessary to permit IDEM corrective action.⁹⁴

B. Equal Protection, Ripeness, and Redevelopment Lists

Indiana cities and towns can do brownfields planning without facing federal equal protection claims by property owners in designated redevelopment zones. In *Patel v. City of Chicago*,⁹⁵ the Seventh Circuit affirmed dismissal of an equal protection claim brought by Chicago hotel owners challenging an ordinance designating ground around the hotels as a redevelopment zone and listing the hotels as potential eminent domain targets. The court held that the claim was not ripe because no eminent domain proceedings had begun.⁹⁶ Judge Wood noted

88. IND. CODE § 13-23-1-1 to -14-4 (2004).

89. 806 N.E.2d 14 (Ind. Ct. App. 2004).

90. *Id.* at 24-25.

91. *Bourbon Mini-Mart, Inc. v. Gast Fuel & Serv., Inc.*, 783 N.E.2d 253, 256 (Ind. 2003).

92. *Id.*

93. 806 N.E.2d at 21-23.

94. *Id.* at 24.

95. 383 F.3d 569 (7th Cir. 2004).

96. *Id.* at 574.

that the court had previously rejected equal protection takings claims based on placement on a redevelopment target list in *SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County*,⁹⁷ pending exhaustion of the state court remedy of an inverse condemnation action.⁹⁸

C. Takings and Clean Water Act Claims

A second Seventh Circuit opinion, *Greenfield Mills, Inc. v. Macklin*,⁹⁹ also stressed the viability of state inverse condemnation claims over federal due process or other constitutional claims, while at the same time allowing a landowner's Clean Water Act ("CWA") claim against the State of Indiana to proceed. The Indiana Department of Natural Resources ("DNR") drained a pond into a river, releasing a large amount of silt, killing fish and turning what had been lake land into muddy wetlands. The riparian owners sued, alleging CWA section 404 unpermitted discharges. The district court had dismissed the CWA claim based on the maintenance exception,¹⁰⁰ which under certain circumstances allows maintenance activity without a permit.¹⁰¹

The Seventh Circuit reversed, finding a factual issue as to whether the four-hour dredging and release of the pond mud was reasonably necessary or a pretext for an unpermitted discharge, or whether in any event the DNR's actions are subject to the "recapture" provisions of 33 U.S.C. § 1344(f)(2) which recaptures otherwise excused actions and requires a permit where the action was intended to and did cause a use to which the body of water involved "was not previously subject."¹⁰² Here, because the conversion from a clean river to stagnant mud flats could meet the test, summary judgment for DNR was not appropriate.¹⁰³

D. Significant Restraints on Citizen Objections to Environmental Permits

Two supreme court opinions outlined important restraints on citizen attacks on environmental permits. Environmental permits are subject to appeal under the Administrative Order and Procedure Acts ("AOPA").¹⁰⁴ AOPA allows an "aggrieved or adversely affected" person to appeal any permit decision. A short automatic stay of the permit is then activated, and a permit-seeker can be held up for years by the uncertainty created by a permit appeal, with little practical recourse against the objector even if the concerns raised are exaggerated or wrong.

In *Huffman v. Indiana Office of Environmental Adjudication*,¹⁰⁵ the Indiana

97. 235 F.3d 1036 (7th Cir. 2000).

98. *Id.* at 1039.

99. 361 F.3d 934 (7th Cir. 2004).

100. 33 U.S.C. § 1344(f)(1)(b) (2000).

101. *Greenfield Mills, Inc.*, 361 F.3d at 944-45.

102. *Id.* at 953-54.

103. *Id.* at 956-57.

104. IND. CODE §§ 4-21.5-1-1 to -15 (2004).

105. 811 N.E.2d 806 (Ind. 2004).

Supreme Court clarified the “aggrieved or adversely affected” requirement. The case concerned an objection to a National Pollution Discharge and Elimination System (“NPDES”) permit obtained by Eli Lilly and Company. The objector, Rosemary Huffman, claimed a right to object personally and as a land owner. Her land claim was based on her ownership of a company that was sole owner of a limited liability corporation which owned property adjacent to the Lilly facility.¹⁰⁶

The court treated the question as one of construction of AOPA requirements—did Ms. Huffman meet the criteria or not—rather than one of the judicial doctrine of “standing.”¹⁰⁷ The court held that to be “aggrieved or adversely affected” means, under long-established law, to “have suffered or be likely to suffer in the immediate future harm to a legal interest,” requiring a “personal stake” in the outcome.¹⁰⁸ The court noted the standards for administrative review and judicial review under AOPA are the same, and require “more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm.”¹⁰⁹

The court held Huffman’s petition was properly dismissed as to property damage because she did not own the adjacent property and she could not act for the limited liability company that did own the property.¹¹⁰ However, the court remanded the claim as to Huffman’s claimed bodily health concern for lack of substantial evidence to support dismissal.¹¹¹ Huffman’s requirement of a personalized interest in permit appeals is a significant limitation on who can appeal a permit under AOPA.

Breitweiser v. Indiana Office of Environmental Adjudication,¹¹² addresses another problem often found in permit appeals. Objectors, particularly pro se citizens, sometimes disregard the procedural requirements of the appeal process. *Breitweiser* shows that can lead to dismissal of the appeal.

Breitweiser was an AOPA challenge to a Confined Animal Feeding Operation (“CAFO”) permit. The Environmental Law Judge (“ELJ”) issued a notice of proposed default after the Breitweisers failed to respond to discovery requests. The Breitweisers had moved to disqualify the ELJ just before the default notice was issued.¹¹³ The Breitweisers then filed a mandate action in the Marion Superior Court; the action was dismissed when the ELJ agreed to rule on all pending matters, including the motion to disqualify.¹¹⁴ The Breitweisers did not answer the discovery. The ELJ then denied the disqualification motion and entered the default order. On judicial review, the Marion Superior Court

106. *Id.* at 808.

107. *Id.* at 809.

108. *Id.* at 810-11.

109. *Id.* at 812.

110. *Id.* at 815-16.

111. *Id.* at 816.

112. 810 N.E.2d 699 (Ind. 2004).

113. *Id.* at 701.

114. *Id.*

affirmed.¹¹⁵

The court of appeals reversed, holding that the ELJ improperly denied the disqualification motion.¹¹⁶ The supreme court granted transfer and reversed the court of appeals.¹¹⁷

The court noted that on judicial review a court can overturn only an error of law or a purely arbitrary decision. Here the court found the notice of default gave the Breitweisers seven days to respond; they chose not to, and the statute mandates the ELJ to enter a default.¹¹⁸ The filing of the mandate action was not a sufficient response.¹¹⁹ AOPA defined the consequence of a failure to act timely.¹²⁰

The Seventh Circuit adopted a slightly less demanding standard for allowing a citizen suit to go forward in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*.¹²¹ *Friends* involved a Clean Water Act ("CWA") citizens suit against Milwaukee over combined sewage overflows ("CSO"). CSOs occur after heavy rain events when storm water overwhelms the combined flow capacity of combined storm and sanitary sewers and a discharge of sanitary and storm sewer water results, damaging the recipient bodies of water. In *Friends* the environmental groups alleged that the State of Wisconsin had failed to enforce the CWA as to the CSOs. Milwaukee claimed a 2002 stipulation of how such CSOs were to be addressed was an adequate enforcement action which would leave the environmental group without the ability to proceed in lieu of the state. The environmentalists argued that a lengthy delay in enforcement as to a prior stipulation (entered into in 1977) showed a lack of actual enforcement. The Seventh Circuit reversed the trial court's dismissal and remanded for a factual determination of whether the changes under the 2002 stipulation had a "realistic prospect" (after giving "some deference" to the state's view on this) of correcting the problem.¹²² If not, the CWA citizen suit would be allowed to proceed.

E. "Good Character"—Permits Can Be Denied to Individuals Based on Prior Bad Acts by A Corporation They Operated

Indiana's "good character" statute¹²³ has had a controversial history.¹²⁴ The

115. *Id.* at 702.

116. *Id.*

117. *Id.*

118. *Id.* at 703.

119. Justices Dickson and Rucker dissented on this point, suggesting the ELJ's entry of the notice of default immediately after the disqualification motion was filed suggested "the possibility it was motivated by vindictive retaliation." *Id.* at 704.

120. *Id.* at 703-04.

121. 382 F.3d 743 (7th Cir. 2004).

122. *Id.* at 765.

123. IND. CODE §§ 13-19-4-1 to -10 (2004).

124. *Ind. Dep't of Env't'l Mgmt. v. Chem. Waste Mgmt. of Ind., Inc.*, 604 N.E.2d 119 (Ind.

statute was designed to allow IDEM to deny permits based upon the applicant's prior environmental record. An initial constitutional attack, successful at the trial court level, was overturned on most though not all points on appeal.¹²⁵

In the *Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc.*,¹²⁶ the court of appeals held IDEM could use the statute to deny a permit to Boone County Resource Recovery Systems, Inc., and various Bankert family members who own that company.¹²⁷ IDEM denied the permit based on Indiana Code section 13-19-4-5(a)(5), finding that the applicants "knowingly and repeatedly violated state or federal environmental protection laws."¹²⁸ On administrative appeal the ELJ sustained IDEM, but a trial court reversed, in large part because IDEM had failed to suspend or revoke the applicants' existing permit based on the alleged violation it now was using to deny the new application.¹²⁹

The court of appeals reversed. It focused the issue as whether a person who was an officer, director, or employee of one or more corporations which had a history of violations can be a "responsible party" who has "knowingly and repeatedly" violated environmental laws. The Bankert family members were not defendants in any prior enforcement action. The statute is silent on what level of personal involvement is required before a person has "knowingly and repeatedly" violated environmental laws.

IDEM construed the statute, the court held, to mean that "when a corporation violates environmental laws, its officers and directors may, under certain circumstances, be deemed responsible for those violations in the context of the Good Character law."¹³⁰ The court held this interpretation was deemed "reasonable" by the ELJ, and decreed that should end the analysis.¹³¹

This conclusion seems at odds with established precedent that an erroneous construction of a statute by an administrative agency is entitled to no deference.¹³² At the very least, a court, not an ELJ, should make at least one determination that a particular construction of a statute is reasonable, or effectively no judicial review has taken place.

The opinion is troubling in that the court declines to address whether the facts of the case actually meet the "reasonable corporate office" standard for

Ct. App. 1992) ("CWMI I"); Ind. Dep't of Env'tl Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331 (Ind. 1994) ("CWMI II").

125. *CWMI II*, 643 N.E.2d at 331.

126. 803 N.E.2d 267 (Ind. Ct. App. 2004).

127. *Id.* at 276.

128. *Id.* at 270.

129. *Id.* at 274 n.1.

130. *Id.* at 274.

131. *Id.*

132. *Comm'r, Dep't of Rev. v. Partlow*, 769 N.E.2d 1212, 1217 (Ind. Ct. App. 2002) (citing *Comm'r, Dep't of Rev. v. Fort*, 760 N.E.2d 1103, 1106 (Ind. Ct. App. 2001) ("An interpretation of a statute by an agency charged with the duty of enforcing it is entitled to great weight, unless the interpretation would be inconsistent with the statute itself.")).

personal liability under *Indiana Department of Environmental Management v. RLG, Inc.*¹³³ The facts recited by the court seem less than conclusive as to personal involvement by the parties now to be barred in directing or controlling prior unlawful activities. The court also excused IDEM from having to explain how it considers, as it must, mitigating factors in the assessment of “good character.” In *CWMI II*, the Indiana Supreme Court declared that a section of the statute which expressly excused IDEM from explaining its mitigating factors decision, even if it based a good character denial solely on allegations of wrongdoing, to be void.¹³⁴ If a government agency is required to consider a fact, but not to explain how it did so, how can there be meaningful judicial review?

F. Solid Waste Management Districts

Solid Waste Management Districts (“Districts”) are a relatively new creation of Indiana law. Composed of single counties or groups of counties, the Districts were established to develop solid waste management plans for their district, which can include contracts with private entities to perform collection and disposal services or creating and running their own facilities. Created pursuant to Indiana Code section 13-21, passed in 1990,¹³⁵ these Districts have the capacity to generate substantial revenue, and have become powerful actors on the local scene. They are especially powerful in smaller counties where a great deal of money, at least relative to other local revenue sources, can be produced from a landfill or other facility.

The Indiana Supreme Court this year decided that these Districts properly exercise both executive and legislative powers, and that they are not preempted from regulating solid waste.¹³⁶ The *Worman* case arose in a dispute over ex parte communication between board members and citizens over a permit the District required a long-term clean fill recycling facility to obtain. The case challenged the right of the District to require such a permit and the conditions the District imposed in the permit regarding what materials the facility could accept. The Indiana Supreme Court held that because a District has hybrid adjudicative and legislative functions, ex parte communications were not improper.¹³⁷ The court also affirmed that the District had the power to impose permit conditions generally and the specific conditions (asphalt and time restrictions, fire and dust control) at issue.¹³⁸ The court reasoned that the permitting process is not purely adjudication, but legislation, and because District boards are mainly composed

133. 755 N.E.2d 556 (Ind. 2001).

134. 643 N.E.2d at 341-42.

135. An Act of Mar. 20, 1990, 1990 Ind. Acts 10.

136. *Worman Enters., Inc. v. Boone County Solid Waste Mgt. Dist.*, 805 N.E.2d 369, 374 (Ind. 2004).

137. *Id.* at 376.

138. *Id.* at 394. The court noted that in 2003 the legislature passed a statute, which became effective after the court of appeals decision, that no District can issue permits for activity regulated by IDEM. IND. CODE § 13-21-3-14(a)(5) (2004).

of public officials who need to communicate with and respond to citizens on local issues, they are not bound by rules concerning ex parte communication.¹³⁹

The problem remaining is that *Worman* invites treatment of permits not as licenses that should be issued if one meets the qualification criteria, but as discretionary decisions based on arbitrary considerations. Moreover, prohibiting ex parte communication does not prohibit communication from citizens. It merely means it must be public and open. Public communication tends to push objective criteria to the forefront. Adjudicatory proceedings at both state and federal levels prohibit ex parte communications.¹⁴⁰ While the court reasoned that license decisions are not adjudication proceedings, the license decisions lead directly to adjudication proceedings. It may not be wise to encourage ex parte decision formation, especially since these local officials, unlike agency personnel, are: (1) subject to intense local political pressure; and (2) often lack technical experience or expertise necessary in the permit decision-making process.

Finally, the court rejected the applicant's equal protection argument that the District had imposed more restrictive conditions on it than on other facilities. The court determined these differences either had a rational basis for differential treatment or were the result of new regulations passed by the District after those other permits were issued.¹⁴¹

CONCLUSION

The cases in the survey period reflect the changing priorities of environmental law. Prohibitory regulation is slowly giving way to efforts to justly and efficiently align costs and benefits. Cost recovery and insurance claims should be allowed to play the maximum possible role in this process because they offer great hope at precision in this process.

139. *Worman*, 805 N.E.2d at 375.

140. See Administrative Order and Procedure Act, IND. CODE § 4-21.5-2-3 (2004); Administrative Proceedings Act, 5 U.S.C. § 557(d)(1) (2000).

141. *Worman*, 805 N.E.2d at 381.

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA*

INTRODUCTION

The Indiana Rules of Evidence ("Rules") have now entered a second decade of implementation and interpretation. Much progress has been made in the intervening period in terms of defining and clarifying the Rules, as well as distinguishing them from the Federal Rules of Evidence.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 2003, and September 30, 2004. The discussion topics are grouped in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. In General

According to Rule 101(a), the Rules apply to all Indiana court proceedings except where "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."¹ In situations where the "rules do not cover a specific evidence issue, common or statutory law shall apply."² This leaves the applicability of the Rules open to debate in many circumstances.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the Rules, has been interpreted by the Indiana Supreme Court to mean that the Rules trump any conflicting statute.³

B. Applicability in Penalty Phase of Trial

In *Dumas v. State*,⁴ Dumas had characterized the penalty phase of his trial as a sentencing hearing where the Rules should not apply. The trial judge allowed Dumas to present hearsay testimony, and the State followed with hearsay testimony of its own.⁵ Rule 101(c)(2) provides that the Rules do not apply in "[p]roceedings relating to extradition, sentencing, probation, or parole."⁶

On appeal, Dumas argued that the State's hearsay evidence should not have been allowed during the penalty phase. The court generally agreed with this contention, stating that "Indiana Evidence Rule 101(c) makes clear that with the

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1. IND. EVID. R. 101(a).

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997) (citing *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996); *Harrison v. State*, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)).

4. 803 N.E.2d 1113 (Ind. 2004).

5. *Id.* at 1120.

6. IND. EVID. R. 101(c)(2).

exception of grand jury proceedings, the proceedings in which the [R]ules of [E]vidence do not apply involve those where evidence is presented to a trial judge alone without the intervention of a jury.”⁷ The rationale here is that the judge will be aware of the law and capable of basing a decision on appropriate factors, while a jury may be improperly influenced by hearsay.⁸ The court found that the Rules are applicable in the penalty phase of a capital trial, and that the trial court had erred by allowing the hearsay,⁹ but found no reversible error because the use of hearsay testimony in the penalty phase had been invited by Dumas.¹⁰

C. *In Relation to the Common Law*

In *Lasater v. House*,¹¹ a decedent had executed a will leaving most of her property to the Lasaters. After a nephew gained power of attorney, the decedent executed a new will which reduced bequests to the Lasaters and increased those to the family. The Lasaters sought to introduce statements made by the decedent which were not made concurrently with the new will.¹²

House argued that the statements could not be used as common law held that such statements must have been made contemporaneously with the act or crime in question. The court held that since Rule 803(3) was applicable, reference to the common law was improper.¹³ In summary, the court said that if the Rules “provide an answer, all other sources, whether statutory or earlier case law, are to be disregarded.”¹⁴

D. *Offer of Proof*

In *King v. State*,¹⁵ King argued on appeal that the trial court erred in preventing him from opposing the testimony of a witness as a product of coaching. However, at trial, King had not offered to prove this point at the time of the objection.¹⁶ The court held that this issue had been waived on appeal, relying on Rule 103(a)(2), which states that an “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the

7. *Dumas*, 803 N.E.2d at 1120-21. The court reached this decision based on the presence of a jury, even though Indiana Code section 35-50-2-9 characterizes the penalty phase as a sentencing hearing. *Id.* (citing IND. CODE § 35-50-2-9).

8. *Id.*

9. *Id.* at 1121.

10. *Id.*

11. 805 N.E.2d 824 (Ind. Ct. App.), *trans. granted, opinion vacated*, 822 N.E.2d 977 (Ind. 2004).

12. *Id.* at 827.

13. *Id.* at 832.

14. *Id.* (quoting 12 ROBERT LOWELL, JR., INDIANA PRACTICE § 102.101 (2d ed. 1995)).

15. 799 N.E.2d 42 (Ind. Ct. App. 2003).

16. *Id.* at 48.

court by a proper offer of proof, or was apparent from the context within which questions were asked.”¹⁷

This conclusion in *King* is consistent with the Indiana Supreme Court’s interpretation of this issue. In *Stroud v. State*,¹⁸ the court stated that in order to “reverse a trial court’s decision to exclude evidence, which we review for an abuse of discretion, there must be (1) error by the court, (2) that affects Defendant’s substantial rights, and (3) the defense must have made an offer of proof or the evidence must have been clear from the context.”¹⁹

E. Subsequent Bad Acts Not Related to Plaintiff

In *Wohlwend v. Edwards*,²⁰ Wohlwend appealed a judgment of negligence based on injuries caused while driving intoxicated. Wohlwend appealed in part based on the contention that the trial court should not have allowed Edwards to introduce evidence of two drunk driving arrests (not involving the plaintiff) occurring subsequent to the incident which caused harm to the plaintiff.²¹

Edwards argued that any error was harmless under Rule 103(a), which states that “[e]rror [cannot] be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party [has been] affected.”²² The court held that a substantial right had been affected as the jury had clearly been asked to punish Wohlwend, at least in part, for unrelated actions occurring after the incident in which the plaintiff had been injured.²³

F. Redaction and Sources of Injuries

In *Walker v. Cuppett*,²⁴ Walker appealed the trial court’s refusal to allow unredacted copies of Cuppett’s medical records. Walker argued that Rule 106 requires the complete document to be introduced where otherwise admissible.²⁵ Cuppett countered that much of the redacted information contained medical opinions and was therefore inadmissible. The court pointed out that while opinions and diagnoses in medical records are an exception to the hearsay rule under Rule 803(6), they must still meet the requirements for expert testimony set forth in Rule 702. Cuppett argued that because Walker did not prove the experts’

17. *Id.* (quoting IND. EVID. R. 103(a)(2)).

18. 809 N.E.2d 274 (Ind. 2004).

19. *Id.* at 283 (citing IND. EVID. R. 103(a); *McCarthy v. State*, 749 N.E.2d 528, 536 (Ind. 2001); *Hauk v. State*, 729 N.E.2d 994, 1002 (Ind. 2000)).

20. 796 N.E.2d 781, 782 (Ind. Ct. App. 2003).

21. *Id.* at 784.

22. *Id.* at 789 (citing IND. EVID. R. 103(a)).

23. *Id.* at 789-90.

24. 808 N.E.2d 85 (Ind. Ct. App. 2004).

25. *Id.* at 97. The embodiment of the completeness doctrine, Rule 106 requires that where a “writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.” IND. EVID. R. 106.

qualifications, the redactions must remain.²⁶

However, the redactions in this case were clearly not performed to separate admissible from inadmissible evidence. The court found that the use of some of the information by Cuppett to demonstrate injuries caused by Walker opened the door to other similar information in the records.²⁷ Citing Rule 705, the court stated that an expert can be forced to disclose the underlying facts or data related to his or her opinion.²⁸ In this case of first impression, the court held that a plaintiff in a personal injury action may not claim entitlement to medical expenses as an element of damages without disclosing to the fact finder that some of the medical treatment received was actually related to ailments unrelated to plaintiff's actions.²⁹

II. JUDICIAL NOTICE OF FACTS GOING TO ULTIMATE ISSUE

In *Brown v. Jones*,³⁰ Jones had been granted a corporate dissolution and appointment of receivership against the company run by Brown. In granting the dissolution, the trial court took judicial notice of bad acts by Brown. In a bifurcated counterclaim proceeding before a jury regarding fraud and conversion claims against Jones, the trial court allowed the judicially-noticed facts to be presented to the jury.³¹ The appellate court reversed the judgment for Jones, based on a finding that the trial court had exceeded the allowable bounds for judicial notice and invaded the purview of the jury by taking judicial notice of facts which were ultimately questions for the jury.³²

Under Rule 201, the trial court was limited to taking judicial notice of the fact that a dissolution and receivership order had been entered. Taking judicial notice of claims made in the earlier proceeding was improperly determinative of facts underlying the basis of the fraud and conversion claims.³³

26. *Id.* at 97-98; *see also In re E.T.*, 808 N.E.2d 639, 644 (Ind. 2004) (holding that while opinions may be contained in business records admissible under Rule 803(6), "the expertise of the opinion giver must be established").

27. *Walker*, 808 N.E.2d at 98.

28. *Id.* at 99. Rule 705 provides that the "expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." IND. EVID. R. 705.

29. *Walker*, 808 N.E.2d at 100.

30. 804 N.E.2d 1197 (Ind. Ct. App. 2004).

31. *Id.* at 1201.

32. *Id.* at 1202.

33. *Id.* Rule 201(a) provides that a court "may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." IND. EVID. R. 201(a).

III. RELEVANCE AND PROBATIVE VALUE VERSUS PREJUDICIAL

A. Subsequent Bad Acts

In *Wohlwend*,³⁴ discussed *supra*, Wohlwend argued on appeal that the issue of subsequent arrests for driving under the influence were irrelevant to the issue of punitive damages for Edwards. Edwards argued that the evidence is relevant for the very purpose of punitive damages—to deter similar bad conduct. The court found the evidence inadmissible under Rule 403, which states that relevant evidence may be excluded where the danger of unfair prejudice substantially outweighed the probative value.³⁵ The danger that such evidence would unfairly prejudice Wohlwend in the consideration of punitive damages substantially outweighed the probative value of the subsequent arrests.³⁶

B. Lyrics Similar to Crime, Written by Defendant

In *Bryant v. State*,³⁷ Bryant had composed rap lyrics which discussed placing a dead body in the trunk of a car. His stepmother's body was found in the trunk of her car, along with evidence that Bryant had been driving the car and showing it to friends. Bryant challenged the relevancy of this evidence.³⁸ The court found that the evidence was relevant because the similarity of the crime to the lyrics made it more probable that Bryant committed the crime.³⁹

Bryant further argued that the evidence was impermissible under Rule 404(b) because they were used to show he was of bad character and to improperly imply that he had committed the crime.⁴⁰ While prior bad acts cannot be used to demonstrate propensity to commit the charged crime, such evidence is admissible if it bears on some other issue and its probative value is not substantially outweighed by its prejudicial effect. The court noted that such evidence would be admissible as to the issue of intent where the defendant goes beyond a denial of guilt and presents a claim of contrary intent. In this case, Bryant had accused his father of the crime, and therefore the lyric evidence was relevant to show

34. 796 N.E.2d 781 (Ind. Ct. App. 2003).

35. *Id.* at 785. Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” IND. EVID. R. 403.

36. *Wohlwend*, 796 N.E.2d at 785.

37. 802 N.E.2d 486 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 968 (Ind. 2004).

38. *Id.* at 498. The lyrics included the phrase “Cuz the 5-0 won’t even know who you are when they pull yo ugly ass out the trunk of my car.” *Id.* (quoting Tr. Ex. 104-05).

39. *Id.*

40. *Id.* Rule 404(b) provides that evidence “of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .” IND. EVID. R. 404(b).

Bryant's hostile attitude toward the victim.⁴¹

C. Evidence of Remedial Measures—Employee Discipline

In *Strack & VanTil, Inc. v. Carter*,⁴² a Strack employee had been notified of a spill and had gone to retrieve a mop, leaving the spill unguarded. By the time he returned, a customer had fallen on the spill and been injured. Strack had issued a written reprimand to the employee for improperly dealing with a dangerous spill, and Carter had been allowed to use this evidence at trial. Strack appealed, saying that Rule 407 prohibits the use of evidence regarding remedial measures.⁴³

The court on appeal agreed that Rule 407 prohibits the use of evidence of remedial measures, and that employee corrective actions qualify as remedial measures. However, in this case, the description of the incident contained in the employee reprimand contradicted the account given by Strack at trial and was therefore admissible for impeachment purposes.⁴⁴

D. Evidence of Bad Acts Allowed

In *Iqbal v. State*,⁴⁵ Iqbal argued that the trial court should not have allowed evidence of his prior bad acts (a violent relationship with the victim) because he never went beyond a mere denial of murder to establish a claim of contrary intent. The trial court allowed use of bad acts occurring within one year of the victim's death to be introduced, although the State had evidence dating back several years.⁴⁶

Evidence of a bad relationship between two parties is generally not admissible under Rule 404(b).⁴⁷ However, if the evidence is relevant to a matter other than propensity to commit the crime, it may be admissible. In this case, "the evidence was relevant to show motive, relationship between the parties, and

41. *Bryant*, 802 N.E.2d at 499.

42. 803 N.E.2d 666 (Ind. Ct. App. 2004).

43. *Id.* at 670. Rule 407 provides:

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

IND. EVID. R. 407.

44. *Strack*, 803 N.E.2d at 671-72.

45. 805 N.E.2d 401 (Ind. Ct. App. 2004).

46. *Id.*

47. *Id.* at 407. Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." IND. EVID. R. 404(b).

absence of mistake.”⁴⁸ The court found that the trial court had properly balanced the prejudicial effect of the prior acts against the probative value by limiting the prior bad acts which could be introduced to those occurring within one year of the murder.⁴⁹

In a similar case, *Reynolds v. State*,⁵⁰ Reynolds appealed his conviction for attempted murder. The trial court allowed evidence of his arrest a few days prior to the crime for residential entry and battery in the same home where the attempted murder occurred. Reynolds argued that this was a violation of Rule 404(b) in that it was impermissible evidence of a prior bad act. He argued that this evidence was more prejudicial than probative because it forced him to choose between invoking the Fifth Amendment and appearing guilty or answering the evidence and prejudicing himself in the current case.⁵¹

The court held that the evidence of the prior act was relevant to prove identity and motive, which were at issue. The prejudicial effect was outweighed by the probative value because it demonstrated why Reynolds would have appeared at that home with a weapon four days after the earlier arrest. The trial court had also admonished the jury on proper use of the testimony⁵²

E. Evidence of Extramarital Affairs Where Spouse is Murdered

In *Camm v. State*,⁵³ Camm appealed his murder conviction, arguing that the State was improperly allowed to introduce extensive evidence of his extramarital affairs and flirtations in violation of Rule 404(b).⁵⁴ In this case of first impression, the State argued that the evidence was relevant to demonstrate motive.⁵⁵

The court held that

evidence of a defendant's marital infidelity is not automatically admissible as proof of motive in a trial for murder or attempted murder of the defendant's spouse. . . . [T]he State must do more than argue that the defendant must have been unhappily married or was a poor husband or wife, ergo he or she had a motive to murder his or her spouse.⁵⁶

In order to be admissible as to motive, such evidence would need to show that these activities had precipitated violence or threats within the marriage, or that

48. *Iqbal*, 805 N.E.2d at 408.

49. *Id.* at 408-09.

50. 797 N.E.2d 864 (Ind. Ct. App. 2003).

51. *Id.* at 867.

52. *Id.* at 868. Reynolds's convictions were, however, reversed and remanded for new trial because the prosecutor told the jury that invoking the Fifth Amendment necessarily means that the defendant has done something to incriminate himself. *Id.* at 868-70.

53. 812 N.E.2d 1127 (Ind. Ct. App. 2004).

54. *Id.* at 1130-31.

55. *Id.* at 1131.

56. *Id.* at 1133.

the defendant had been involved in an extramarital affair at the time of the crime. Even this evidence could be limited in its admissibility by remoteness in time, insufficient proof, or general concern over unfair prejudice.⁵⁷ Camm's murder convictions were reversed.⁵⁸

F. Evidence of Searching a Victim's Wallet

In *State v. Seabrooks*,⁵⁹ Seabrooks argued that the trial court should not have admitted testimony that he had been going through the wallet of a victim after the murder occurred because such testimony violated Rules 403 and 404(b).⁶⁰

The court found that the testimony was relevant because it showed that Seabrooks was a willing participant, rather than a bystander. The court had also given a limiting instruction to the jury, prohibiting that testimony's use to show Seabrooks was generally a bad guy. Therefore the court found that Seabrooks had failed to show that the probative value had been substantially outweighed by any prejudicial effect.⁶¹ The court likewise rejected the 404(b) claim as this rule applies to evidence of a crime or act committed on another day, in another place, and whose purpose is to show the person is someone who commits crimes.⁶²

G. Evidence of Prior Citation in Civil Case

In *Lepucki v. Lake County Sheriff's Department*,⁶³ Lepucki appealed a civil verdict in favor of defendant sheriff's department. Lepucki had sued the sheriff's department after a collision with a police vehicle in which Lepucki had been cited for failure to yield to an emergency vehicle. In the civil suit, evidence of the infraction was allowed and the verdict was found for the sheriff's department.⁶⁴

Both Indiana statute and Rule 803(22) allow the introduction of prior convictions or admissions, but only where the event was a crime punishable by more than one year, but the citation issued to Lepucki was an infraction rather than a crime.⁶⁵ The court also considered whether the prejudicial effect of

57. *Id.*

58. *Id.* at 1142.

59. 803 N.E.2d 1190 (Ind. Ct. App. 2004).

60. *Id.* at 1193.

61. *Id.* at 1194.

62. *Id.* (quoting *Swanson v. State*, 666 N.E.2d 397, 398 (Ind. 1996)).

63. 801 N.E.2d 636 (Ind. Ct. App. 2003).

64. *Id.* at 638.

65. *Id.* at 639. Indiana Code section 34-39-3-1 states that evidence of a final judgment that "(1) is entered after a trial or upon a plea of guilty; and (2) adjudges a person guilty of a crime punishable by death or imprisonment of more than one (1) year; shall be admissible in a civil action." IND. CODE § 34-39-3-1(a)(1) (2004). Rule 803(22) provides that evidence "of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment is not excluded by the hearsay rule." IND. EVID.

allowing proof of the citation outweighed the probative value. Because the citation did not consider whether the officer breached his statutory duty of care, and where any degree of fault attributed to Lepucki would decide the case, the introduction of the infraction evidence improperly invaded the province of the jury to decide the matter.⁶⁶

H. Partially Inaudible 911 Call Recording

In *Benavides v. State*,⁶⁷ Benavides had been convicted of burglary, robbery and criminal confinement. At the time the home was broken into, the victim had been calling 911 for assistance. On appeal, Benavides argued that portions of the call were unintelligible and lead the jury to speculate as to the missing content.⁶⁸

The court stated the general rule that recordings be intelligible enough for the offered purpose, and that the probative value is not outweighed by the danger of confusion or unfair prejudice. In this case, the tape was offered not for the purpose of proving the meaning of the words on the tape, but for the purpose of showing that a forcible entry had occurred, and to contradict Benevides's version of the events, in which he claimed he had been invited into the home.⁶⁹

I. Photographs of Victim as Altered by Autopsy

In *Helsley v. State*,⁷⁰ Helsley argued that photographs of the victims showing them with heads shaved by the pathologist were cumulative of the pre-shaving photos and were prejudicial in that the shaving made the wounds appear more gruesome.⁷¹

The court stated that photographs may only be excluded where their probative value is substantially outweighed by the danger of unfair prejudice. In this case, the jury had viewed photos of the victims before and after the shaving, so it was clear that the pathologist had done the shaving (not Helsley) and the shaving allowed the jury to better understand the nature of the wounds.⁷²

J. Exceptions to Non-admissibility of Evidence Discovered During Offers to Compromise

In *Bridges v. Metromedia Steakhouse Co.*,⁷³ Bridges sued Metromedia for

R. 803(22).

66. 801 N.E.2d at 639. The court noted, however, that had Lepucki admitted guilt in the traffic citation action, that fact would have been admissible as a statement by a party opponent under Rule 801(d)(2). *Id.*

67. 808 N.E.2d 708 (Ind. Ct. App. 2004).

68. *Id.* at 710-11.

69. *Id.* at 711-12.

70. 809 N.E.2d 292 (Ind. 2004).

71. *Id.* at 296.

72. *Id.*

73. 807 N.E.2d 162 (Ind. Ct. App. 2004).

injury to her hand at a restaurant. Bridges claimed she had redness and swelling for several years after the incident. Testimony at trial included a witness who observed Bridges's hand at a settlement conference during that time and had observed neither swelling nor redness.⁷⁴

In a case of first impression, Bridges contended that Rule 408 prohibits testimony regarding knowledge gained solely during the mediation process.⁷⁵ The court held that the observation was not of conduct or statements in offer of compromise, but an observation of physical condition and therefore, Rule 408 did not prohibit testimony on this point.⁷⁶

K. Admissibility of Preliminary Agreement on Individual Terms of Overall Agreement

In *Worman Enterprises, Inc. v. Boone County Solid Waste Management District*,⁷⁷ the waste district claimed that Worman needed a permit to continue operations and set forth several items and conditions. In responding to certain portions of the permit preconditions, Worman stated that certain provisions were acceptable. Worman sued the district without completing the process, claiming the district was not allowed to regulate its business. The district claimed that Worman was precluded from arguing on points where Worman found the district's demands agreeable.⁷⁸

The court found that the statements of agreeability had been made by Worman as part of the overall process of settling the permit dispute, and were therefore subject to Rule 408 and not admissible to demonstrate that Worman had waived these issues.⁷⁹

74. *Id.* at 164.

75. *Id.* Rule 408 states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

IND. EVID. R. 408.

76. *Bridges*, 807 N.E.2d at 166-67.

77. 805 N.E.2d 369 (Ind. 2004).

78. *Id.* at 376.

79. *Id.* at 376-77.

IV. WITNESSES

A. Hypnosis

In *King v. State*,⁸⁰ King appealed his convictions in part based on the assertion that a key witness had testified after hypnosis in violation of Rule 602.⁸¹ This contention was based on an entry in the witness's medical record which stated that:

[Patient] states once she calmed down, she was able to breath. [Discussed] possibility of panic attacks & educated her as to what happens [with] a panic attack. Told her to also mention her symptoms to her M.D. [Patient] was responsive to clinical hypnosis & was able to obtain good level of relaxation. Offered reassurances [regarding] her safety, discussed son's situation & his return to school.⁸²

The court found no error in this witness's testimony.⁸³ The witness had unequivocally identified the defendant before giving the questioned testimony to police and the witness denied having been hypnotized.⁸⁴

B. Juror Misconduct

In *Evans v. Buffington Harbor River Boats*,⁸⁵ an alternate juror signed an affidavit claiming that the jury had improperly: refused damages for the victim's husband as he had not been present or injured, refused to award damages for future surgeries because a juror with nursing experience stated that Medicare or Medicaid would pay for them, refused a large award because a portion would go to Evans's lawyer who needed no more money, and refused to grant a substantial award to the victim because she had a casino player's card and would likely gamble away any amount awarded by the jury.⁸⁶

On appeal, Evans argued that these actions were violative of Rule 606(b).⁸⁷

80. 799 N.E.2d 42 (Ind. Ct. App. 2003).

81. *Id.* at 47. Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis." IND. EVID. R. 602.

82. *King*, 799 N.E.2d at 47 (quoting Appellant's App. at 192-93).

83. *Id.*

84. *Id.*

85. 799 N.E.2d 1103 (Ind. Ct. App. 2003).

86. *Id.* at 1108.

87. *Id.* Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify (1) to drug or

The court noted that the allegation that the jury decided to award zero to the husband and considered the player's card did not fit into any of the three exceptions to Rule 606(b) and was therefore not subject to inquiry.⁸⁸ In examining the remaining two allegations, the court noted that they neither involved drug or alcohol use or outside influence improperly brought on the jury. This left only the category of extraneous prejudicial information, and since none of the information in these two allegations had originated outside the jury, they could not be examined for improper conduct.⁸⁹

In *McManus v. State*,⁹⁰ McManus attempted to offer a newspaper article into evidence at his sentencing hearing. The article purported to relate jurors' perceptions of McManus during the trial. The court refused to allow this article to be presented at the sentencing hearing.⁹¹

The only issue that McManus claimed the article raised was defense counsel's inability to explain his cool demeanor at trial as counsel was unaware of the medication prescribed for McManus. The court held that this was not a listed exception under Rule 606(b), and therefore had been correctly excluded from evidence.⁹²

C. Use of Document to Refresh Recollection Not Prepared by Witness

In *Mroz v. Harrison*,⁹³ Mroz appealed the judgment of the trial court in part because Mroz had been prevented from using a document prepared by Harrison's employer to refresh Harrison's recollection during testimony because it had not been prepared by the witness. The trial court had instructed Mroz that he could use the document to impeach Harrison.⁹⁴

Mroz claimed this violated Rule 612.⁹⁵ The court held that Rule 612 does not require the document to have been made by the witness, and pre-Rules law held that a document need not be prepared by the witness.⁹⁶ The trial court erred by

alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

IND. EVID. R. 606(b).

88. 799 N.E.2d at 1109.

89. *Id.* at 1110.

90. 814 N.E.2d 253 (Ind. 2004), *petition for cert. filed* (Apr. 28, 2005) (No. 04-9935).

91. *Id.* at 264.

92. *Id.* at 264-65.

93. 815 N.E.2d 551 (Ind. Ct. App. 2004).

94. *Id.* at 553.

95. *Id.* Rule 612(a) provides that "[i]f, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." IND. EVID. R. 612(a).

96. *Mroz*, 815 N.E.2d at 553-54.

refusing to allow the document to be used for recollection. However, the error was found harmless because all of the contents of the document could have been raised through impeachment.⁹⁷

D. Jury Questions to Witnesses

In *Ashba v. State*,⁹⁸ Ashba claimed that the trial court had erred by not asking the jury if it had questions at the end of testimony by each witness. Ashba argued that this was required by new Jury Rule 20, which became effective on January 1, 2003. Jury Rule 20 states that the “court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following: . . . (7) that jurors may seek to ask questions of the witnesses by submission of questions in writing.”⁹⁹

The court noted that Jury Rule 20 does not set forth an exact procedure, and that the supreme court has also promulgated Rule 614(d) which sets forth a procedure for the jury to submit questions to a witness. Therefore, juror questions should be written and submitted to the court, and subject to objections, the trial court may then ask the questions of the witness if it so desires.¹⁰⁰

V. OPINIONS AND EXPERT TESTIMONY

A. Testimony on the Ultimate Question of Law

In *Lasater*,¹⁰¹ introduced *supra*, the Lasaters appealed the trial judge’s decision to exclude the expert testimony of an attorney and a psychologist. The issue about which these individuals offered testimony was whether or not undue influence had been exerted in the creation of a second will. Both individuals made statements indicating that undue influence existed.¹⁰²

The court found that the Lasaters waived this argument on appeal by not including relevant memorandas or transcripts.¹⁰³ However, the court went on to say that the testimony would be excludable under Rule 704 in any case, because the testimony would have offered an opinion on the ultimate question of law at

97. *Id.* at 554.

98. 816 N.E.2d 862 (Ind. Ct. App. 2004).

99. *Id.* at 865.

100. *Id.* Rule 614(d) provides that a member of the jury

may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

IND. EVID. R. 614(d).

101. *Lasater v. House*, 805 N.E.2d 824 (Ind. Ct. App. 2004).

102. *Id.* at 833-34.

103. *Id.*

issue: whether or not undue influence had been exerted.¹⁰⁴

B. Laying the Foundation for Lay Witness

In *Stroud*,¹⁰⁵ discussed *supra*, a police officer was allowed to testify that two pairs of shoes approximately one half size different from each other likely belonged to the same person based on his opinion that Reebok shoes run smaller than Nike shoes. The State failed to lay a foundation for the officer's opinion, which would have allowed the opinion under Rule 701.¹⁰⁶

Unfortunately for Stroud's appeal, the court found the error harmless. At trial, after the trial judge overruled the objection from Stroud regarding this testimony, defense counsel asked the officer how many times he had purchased each type of shoe. The officer stated that he had purchased each type of shoe approximately twenty times. Because the question from defense counsel laid a foundation for the immediately preceding testimony, any error in allowing the testimony was rendered harmless.¹⁰⁷

C. Admissibility of Scientific Evidence Versus Weight Given to Evidence

In *Burnett v. State*,¹⁰⁸ Burnett appealed his conviction, arguing that testimony from a witness regarding fingerprint evidence had not been properly established. Burnett claimed the trial court erred in allowing the testimony as the witness was not a certified latent fingerprint expert, the witness's previous trial testimony had not required fingerprint identification, and the witness was unable to answer some technical questions regarding the specific identification method used.¹⁰⁹ The court found no error in qualifying the witness as an expert based on his experience and training.¹¹⁰ The factors cited by Burnett were not sufficient to disqualify the witness, but instead go to the weight the trier of fact gave to the testimony itself.¹¹¹

104. *Id.* at 834-35. Rule 704 provides that "(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. (b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." IND. EVID. R. 704.

105. 809 N.E.2d 274 (Ind. 2004).

106. *Id.* at 284. Rule 701 states that a lay witness may testify to opinions or inferences if they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." IND. EVID. R. 701.

107. 809 N.E.2d at 284.

108. 815 N.E.2d 201 (Ind. Ct. App. 2004), *reh'g denied*, (Dec. 20, 2004).

109. *Id.* at 205.

110. *Id.* at 206.

111. *Id.* at 206-07. The court noted that while Rule 702(b) requires the court to be satisfied with the reliability of the underlying scientific principles, the trial court determines these preliminary questions under Rule 104(a), which imposes a burden of proof by preponderance of the evidence. This simply means the court must find that it is more likely than not that the scientific

D. Expert Testifying to Intent, Guilt, or Innocence

In *Julian v. State*,¹¹² Julian appealed his conviction for arson in part by arguing that the State should not have been allowed to introduce testimony of an expert witness who concluded that the fire was intentionally set to cover up a burglary. Julian contended that this violated Rule 704(b), which states that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.”¹¹³

The court found that the witness merely testified that the fire was set intentionally, not that Julian had been the cause of the fire. Therefore, there was no error in allowing the testimony.¹¹⁴

E. Utilizing Daubert Under the Rules

In *West v. State*,¹¹⁵ West appealed his conviction for possession of anhydrous ammonia in part based on his contention that the Draeger Test conducted by a deputy should not have been admitted at trial because the scientific reliability of the test had not been established. At trial, the deputy had testified about how the test works, his training in using the test, that the DEA utilizes the test and trained him, and that an environmental cleanup agency trained him and uses the test in its work.¹¹⁶

The court held that, in the absence of judicial notice of reliability, the State must establish a sufficient foundation for reliability of the method used.¹¹⁷ While affirming that *Daubert* factors are not controlling, the court stated that they do have utility in deciding whether scientific evidence is reliable under Rule 702(b). Because the State had failed to present sufficient evidence regarding the testing of the Draeger test, whether the Draeger test has been subjected to peer review and publication, the known potential error rate of the Draeger test, the existence and maintenance of standards controlling operation of the test, or its general acceptance in the scientific community, the trial court erred in allowing the evidence. However, because other evidence supported the conviction, the error was harmless.¹¹⁸

principles underlying the testimony are reliable. *Id.* (citing 13 LOWELL, *supra* note 14, §702.207).

112. 811 N.E.2d 392 (Ind. Ct. App. 2004).

113. *Id.* at 399 (quoting IND. EVID. R. 704(b)).

114. *Id.* at 400.

115. 805 N.E.2d 909 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

116. *Id.* at 912-13.

117. *Id.* at 912.

118. *Id.* at 913-14.

F. Police Officer's Opinion on Potential Penalty

In *Blanchard v. State*,¹¹⁹ Blanchard argued on appeal that he received ineffective assistance of counsel because his attorney failed to enter into evidence testimony that a police detective told him at the time of his arrest that it would be “up to the Prosecutor’s Office, but [Blanchard] could be looking at something less than murder.”¹²⁰ The court stated that although Rules 701 and 702 allow opinion testimony by lay witnesses and experts, Rule 704 states that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case.”¹²¹ The court held that the officer’s statement was a prohibited declaration of Blanchard’s innocence on the charge of murder.¹²²

G. Lack of Testing or Foundation

In *Lytle v. Ford Motor Co.*,¹²³ Lytle appealed summary judgment for Ford, arguing that proffered expert testimony demonstrating that Ford’s seat belt design was defective should have been allowed. The testimony of Lytle’s two expert witnesses was excluded because the trial court found there had been insufficient testing and no credible expert testimony based on scientific principles that the offered theory would work in the real world.¹²⁴

The court began by noting that where expert testimony is advanced to establish causation, summary judgment is appropriate where the testimony does not meet the requirements of Rule 702.¹²⁵ Lytle contended that Indiana law made a distinction between testing based on scientific principles and expert testimony based on skilled observations. While Lytle relied on recent Indiana cases allowing expert testimony based on observation where the basis for the testimony had been established by judicial notice or a showing of reliability, rather than testing and established scientific principles, those cases did not involve an attempt to explain complex physical events.¹²⁶

The court held that the expert testimony had been properly excluded because

119. 802 N.E.2d 14 (Ind. Ct. App. 2004).

120. *Id.* at 34 (quoting Tr. at 192).

121. *Id.* (quoting IND. EVID. R. 704)

122. *Id.* at 35. *But see* Witte v. M.M., 800 N.E.2d 185, 193 (Ind. Ct. App. 2003), *vacated*, 820 N.E.2d 128 (Ind. 2005) (holding, at the court of appeals level, that an officer may be allowed to testify in a civil case as to even the ultimate issue of the case where the testimony concerns matters not within the common knowledge and experience of the ordinary person and where the testimony will aid the jury).

123. 814 N.E.2d 301 (Ind. Ct. App. 2004), *reh’g denied*, (Dec. 2, 2004).

124. *Id.* at 307.

125. *Id.* at 308 (citing *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593, 595 (Ind. Ct. App. 1996), *trans. denied*, 726 N.E.2d 297 (Ind. 1999)).

126. *Id.* at 309-10. Lytle relied on the following cases: *Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1168 (Ind. Ct. App. 2000); *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003); and *PSI Energy, Inc. v. Home Insurance Co.*, 801 N.E.2d 705, 740-41 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 805 (Ind. 2004).

the two proffered experts simply hypothesized what might have occurred during the accident and conducted simple manipulation of seat belt mechanisms, whereas the previous cases utilized experts who relied on observations of physical evidence, such as shoe prints, photographs, bullet wounds, concrete cracks, and cells under a microscope.¹²⁷ Although both experts were qualified professionals, they failed to utilize any scientifically-reliable testing and merely hypothesized as to events which may have occurred during the accident.¹²⁸

In *Messer v. Cerestar USA, Inc.*,¹²⁹ expert testimony had been admitted at trial, attesting that a gate had failed, resulting in death, because the gate was not strong enough for its intended purpose. On appeal Cerestar argued that the expert offering the evidence was not qualified because he was not an engineer and his college degree was in Education.¹³⁰ The court found that the witness was qualified under Rule 702 through experience as he had eighteen years of experience working in construction and engineering.¹³¹

Cerestar also argued that the affidavit offered by the expert should have been excluded because the evidence failed to demonstrate that the testimony was based on reliable scientific principles as required by Rule 702(b). Because the affidavit failed to reveal the scientific method used, or any evidence of measurements or scientific analysis, the evidence should have been excluded.¹³²

In *PSI Energy, Inc. v. Home Insurance Co.*,¹³³ the insurance company argued that the trial court abused its discretion in allowing expert testimony because the scientific reliability had not been sufficiently established. The expert testified that damage to certain structures built in the 1800s occurred due to a “cumulative effect” of disruptive events combined with natural decay and the materials contained in the construction process. The expert admitted that there was no method to verify this theory through scientific observations, measurements or calculations.¹³⁴

The expert based his theory on his observations and his experience as an engineer with experience in subsurface structures. The court stated that when examining reliability, the foundation required becomes more advanced and complex as the scientific method proposed becomes more advanced and complex, and that the converse is applicable as well. This type of analysis was more like observations of a person with specialized knowledge than a matter of scientific principles governed by Rule 702(b). Therefore, the trial court properly allowed

127. *Lytle*, 814 N.E.2d at 311-12.

128. *Id.* at 312-15. In other words, no matter how smart you are, you can’t make stuff up.

129. 803 N.E.2d 1240 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

130. *Id.* at 1247-48.

131. *Id.* at 1248. The court reasoned that Rule 702 does not require a formal college education in a particular field to be qualified as an expert witness.

132. *Id.* The court noted that this witness would qualify as an expert and could indeed testify, assuming he set out the reliability for the basis of his testimony.

133. 801 N.E.2d 705 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 805 (Ind. 2004).

134. *Id.* at 739-40.

the testimony as observations of a person with specialized knowledge.¹³⁵

H. Expert Testimony by a Family Member

In *Mitchell v. State*,¹³⁶ Mitchell appealed his conviction, in part based on his contention that the trial court improperly refused to qualify his wife as an expert witness. Although his wife was a doctor and examined the child shortly after the incident, the trial court held that she could not testify as an expert witness because she was not an unbiased third party.¹³⁷ She was, however, allowed to testify as to the presence of bruises.¹³⁸

The court held that it was an abuse of discretion by the trial court to rule out the testimony of Mitchell's wife without hearing evidence on the issue.¹³⁹ The proper procedure would have been to allow the testimony, while giving the State an opportunity to demonstrate any actual bias. The conviction was affirmed as the error was held harmless due to the cumulative nature of the evidence and because another expert gave testimony on the subject.¹⁴⁰

VI. HEARSAY

A. Testator's Statements Made Non-Contemporaneously Regarding a Will

In *Lasater*,¹⁴¹ discussed *supra*, the Lasaters appealed the exclusion at trial of evidence regarding statements made by the decedent which were not made contemporaneously with the will. House argued that the statements are hearsay and should be excluded because Indiana has traditionally excluded a testator's statements that were not made at the time of the will's execution.¹⁴²

135. *Id.* at 741. The court noted that the expert would be subject to cross-examination on his testimony, where the party opposing the testimony may expose flaws in the observations, qualifications, or conclusions of the witness. *See also* Ill. Farmers Ins. Co. v. Wiegand, 808 N.E.2d 180, 186 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 975 (Ind. 2004) (holding that an expert's affidavit was admissible because it did more than make bald assertions; it included admissible facts upon which the opinion was based, provided the reasoning upon which the ultimate opinion was reached, and provided the trial court with sufficient basis to conclude that the principles used to arrive at the opinion were reliable.); Thayer v. Vaughan, 798 N.E.2d 249, 253-54 (Ind. Ct. App. 2003) (holding that an affidavit from a licensed psychiatrist who testified to his credentials, experience, and education which expressly detailed how he arrived at his conclusions amounted to more than bald assertions and was reliable for consideration by the court during summary judgment proceedings).

136. 813 N.E.2d 422 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

137. *Id.* at 426.

138. *Id.* at 431.

139. *Id.*

140. *Id.* at 432.

141. *Lasater v. House*, 805 N.E.2d 824 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 977 (Ind. 2004).

142. *Id.* at 828.

The court found the statements made after execution of the second will were admissible under Rule 803(3).¹⁴³ The statements may have been admissible both to show the decedent's state of mind and also to prove a fact remembered or believed, as long as the statements pertain specifically to the execution, revocation, or terms of her will.¹⁴⁴

B. Medical Opinions Contained in a Report

In *Wilkinson v. Swafford*,¹⁴⁵ Swafford appealed, claiming that the trial court erred when it excluded testimony from a doctor which discussed medical opinions recorded by the doctor's partner. Swafford argued that the record was admissible under the hearsay exception of Rule 803(6).¹⁴⁶

The court concluded that while the reports may indeed be excluded from the hearsay rule as business records, they must still be otherwise admissible.¹⁴⁷ In this case, the medical opinions contained in the report were properly excluded because the proponent of the evidence failed both to lay a foundation for the expert qualifications of the doctor who made the report and because the accuracy of the records could not be tested without the availability of the doctor who made them for cross-examination.¹⁴⁸

C. Recorded Jailhouse Conversation

In *Dorsey v. State*,¹⁴⁹ Dorsey appealed his conviction, based in part on his contention that the trial court erred when it allowed the State to introduce a recording of a jailhouse phone call between Dorsey and an unidentified man with

143. *Id.* at 829. Rule 803(3) provides that the following are not excluded by the hearsay rule . . . [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant's will.

IND. EVID. R. 803(3).

144. *Lasater*, 805 N.E.2d at 829.

145. 811 N.E.2d 374 (Ind. Ct. App. 2004).

146. *Id.* at 388. Rule 803(6) provides that the following is not excluded by the hearsay rule: [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

IND. EVID. R. 803(6).

147. *Wilkinson*, 811 N.E.2d at 390 (citing *Schaefer v. State*, 750 N.E.2d 787, 793 (Ind. Ct. App. 2001)).

148. *Id.* at 391-92.

149. 802 N.E.2d 991 (Ind. Ct. App. 2004).

whom Dorsey discussed committing perjury in the trial. Dorsey claimed the conversation was hearsay because it was an out of court statement, used to prove the truth of the matter asserted.¹⁵⁰

The court agreed the conversation would indeed qualify as hearsay. However, it also agreed with the State's contention that the unidentified person speaking with Dorsey was acting as Dorsey's agent, and therefore the conversation fell under the hearsay exception for statement by a party opponent.¹⁵¹

D. Arrest Report as a Business Record

In *Serrano v. State*,¹⁵² Serrano appealed his conviction for sexual misconduct with a minor, claiming that the only evidence of his age presented at trial was the arrest record, which was inadmissible hearsay. The court agreed that the arrest record was hearsay under Rule 801(c), and therefore examined whether the trial court had properly allowed the record into evidence under Rule 803(6) as a certified copy of a public record.¹⁵³

At trial the custodian of the records testified that he was the keeper of the records and the arrest record had been made at or near the time of the event recorded. He did not testify that the arresting officer had personal knowledge of the contents of the report, and the arresting officer did not testify, so the arresting officer could not be cross-examined. These facts, combined with evidence of a different date of birth for Serrano (which would have rendered him incapable of committing the charged crime) resulted in the court's holding that the record was

150. *Id.* at 993. Rule 801(c) states that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." IND. EVID. R. 801(c).

151. *Dorsey*, 802 N.E.2d at 994. Rule 801(d)(2)(D) states that a statement is not hearsay if it is offered against a party and it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." IND. EVID. R. 801(d)(2)(D).

152. 808 N.E.2d 724 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 977 (Ind. 2004).

153. *Id.* at 727. Rule 803(6) provides that the

following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

IND. EVID. R. 803(6).

unreliable. The court held the evidence insufficient to support the conviction and reversed the conviction.¹⁵⁴

E. Witness Unavailable

In *Bass v. State*,¹⁵⁵ Bass appealed his convictions for driving while suspended and failure to stop after an accident, arguing that the State's only evidence that he was driving was testimony from a police officer about what Bass's girlfriend, Fewell, had said. Bass argued that this constituted inadmissible hearsay. The State prevailed at trial by claiming that Fewell was unavailable, as she had been issued a subpoena and failed to appear at trial.¹⁵⁶

The court held that it could not determine if Fewell was indeed unavailable because there was no evidence that Fewell had actually been served with the subpoena.¹⁵⁷ The court further found that even had Fewell been found unavailable, the testimony did not meet the requirements of Rule 804(b) because unavailability simply opens the door to one of the exceptions to the hearsay rule rather than automatically rendering the evidence admissible. Although Fewell may have been unavailable as a witness, her statement to the police did not fall under any of the exceptions of Rule 804(b), and was therefore inadmissible. As this was the only evidence that Bass was the driver of the vehicle, the convictions were reversed.¹⁵⁸

F. Admissibility of Breath Tests

In *State v. Lloyd*,¹⁵⁹ the State appealed a reserved question of law. At trial, Lloyd challenged the foundation of the police officer's certification to perform breath tests. The deputy testified that he had received an initial twelve hours of training and an additional four hours. Citing an Indiana Administrative Code provision published in an earlier case, the trial court excluded the deputy's certification as hearsay because breath test certification required at least twenty hours of training.¹⁶⁰ The trial court ruled that the certification was hearsay under Rule 801(c).¹⁶¹

On appeal, the court found that an exception to the hearsay rule exists in Rule 803(8) for public records and reports. Because the documentation of the deputy's certification was a domestic public record, the record was self-authenticating under Rule 902(1), and the court found that such certifications are

154. *Serrano*, 808 N.E.2d at 727-28. The court also held that Serrano could not be retried for the crime a second time.

155. 797 N.E.2d 303 (Ind. Ct. App. 2003).

156. *Id.* at 304-05.

157. *Id.* at 306.

158. *Id.* at 306-07.

159. 800 N.E.2d 196 (Ind. Ct. App. 2003).

160. *Id.* at 198 (citing *Wray v. State*, 751 N.E.2d 679 (Ind. Ct. App. 2001)).

161. *Id.*

specifically admissible under Indiana law.¹⁶²

G. Excited Utterance and the Sixth Amendment

In *Rogers v. State*,¹⁶³ Rogers appealed his conviction for criminal recklessness and battery, in part based on his contention that the trial court improperly admitted hearsay testimony by a police officer containing statements of the victim, Faith, in violation of Rule 803(2). The State offered statements made by Faith to police within seven minutes of the police arriving at the scene. The officer had observed that Faith was visibly upset and shaken at the time the statement was taken.¹⁶⁴

Although the court found that the statements did fall under the excited utterance exception to the hearsay rule, it conducted an additional analysis in response to a recent U.S. Supreme Court case, *Crawford v. Washington*. Rogers argued that Faith's utterances violated his right to confront and cross examine under the Sixth Amendment to the U.S. Constitution.¹⁶⁵

In *Crawford*, the Supreme Court held that the Sixth Amendment required two showings in order to introduce a testimonial out of court statement into evidence against a criminal defendant: unavailability of the witness and a prior opportunity to cross-examine the witness.¹⁶⁶ The court found that statements

162. *Id.* at 199 (citing IND. CODE § 9-30-6-5(c)(1)). Rule 902(1) provides:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) *Domestic public documents*. The original or a duplicate of a domestic official record proved in the following manner: An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

IND. EVID. R. 902(1). The administrative code provision was also amended in 2000 to require only twelve hours of certification. *Lloyd*, 800 N.E.2d. at 200 (citing IND. ADMIN. CODE tit. 260, r. 1.1-1-2).

163. 814 N.E.2d 695 (Ind. Ct. App. 2004).

164. *Id.* at 669. Rule 803(2) provides that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." IND. EVID. R. 803(2).

165. *Rogers*, 814 N.E.2d at 700 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

166. *Id.*

made during a police interrogation were “testimonial,” and that Faith’s statements to the officer were not given under police interrogation and therefore not subject to the *Crawford* analysis.¹⁶⁷

*H. Statement Made for Purposes of Medical Diagnosis
or Dying Declaration?*

In *Beverly v. State*,¹⁶⁸ the trial court had admitted a statement from the victim that “Jerry did it,” made while the victim was lethargic and declining from a bullet wound to the head. At trial, the State advanced several bases as to the admissibility of the statement, including as a statement made for the purposes of medical diagnosis.¹⁶⁹

The court found that a statement of identification is not necessary to provide effective medical care, and therefore the statement could not be admitted under Rule 803(4).¹⁷⁰ The statement was found admissible as a dying declaration under Rule 804(b)(2).¹⁷¹

167. *Id.* at 701-02; *see also* *Clark v. State*, 808 N.E.2d 1183, 1190 n.2 (Ind. 2004) (noting that *Crawford* is inapplicable where the declarant testifies at trial); *Fowler v. State*, 809 N.E.2d 960, 964-65 (Ind. Ct. App. 2004), *trans. granted*, (Ind. Dec. 9, 2004) (holding that a statement given to police who arrived at the scene and began informally questioning those around while the victim is still bleeding and crying from domestic violence was not testimonial and the evidence fell under the excited utterance exception and outside the Supreme Court’s decision in *Crawford*); *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *trans. granted*, (Ind. Dec. 9, 2004) (holding that statements from a domestic violence victim, taken by police arriving at the scene and informally questioning those around while the victim seemed frightened and timid and the residence was in disarray with broken glass about qualifies as an excited utterance and falls outside the purview of *Crawford*).

168. 801 N.E.2d 1254, 1258 (Ind. Ct. App. 2004).

169. *Id.*

170. *Id.* at 1259. Rule 803(4) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

IND. EVID. R. 803(4).

171. *Beverly*, 801 N.E.2d at 1260. Rule 804(b)(2) states that the “following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (2) *Statement under belief of impending death*. A statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.” IND. EVID. R. 804(b)(2).

I. Dying Declaration of Death Penalty Subject

In *Thompson v. State*,¹⁷² Thompson appealed the denial of post-conviction relief on the basis of newly discovered testimony. A co-defendant who was administered the death penalty said in his last words that Thompson "did not know what was going on."¹⁷³

The court found the statement to be unreliable hearsay that did not fit within the dying declaration exception of Rule 804(b)(2).¹⁷⁴ A dying declaration must relate to the cause or circumstances giving rise to the fatal injury and cannot include what happened before or after the injury. The exculpatory statement regarding Thompson's knowledge of what was going on at the time the crime was committed neither indicated Thompson was not present at the crime, nor involved the cause or circumstances of death for the declarant—the death penalty administered by the Indiana Department of Corrections.¹⁷⁵

J. Public Records Exception

In *Bailey v. State*,¹⁷⁶ Bailey challenged her conviction for theft on the basis that records from the Indianapolis Housing Authority (IHA) admitted at trial were hearsay and were neither business records under Rule 803(6) nor public records under Rule 803(8). Bailey also argued that the officer who testified as to the IHA records was not the regular custodian of the records and did not have personal knowledge of the contents of the records. The documents were various housing applications and recertifications to receive public housing from IHA. By law, changes in income must be reported to IHA when they occur. Bailey had failed to report several changes to her employment situation.¹⁷⁷

The court noted that Rule 803(8) does not have several of the foundational requirements found in Rule 803(6) for a business record and because the records were prepared by an agency in response to its duties under the law, they were admissible as public records.¹⁷⁸ Bailey also contended that the documents were

172. 796 N.E.2d 834 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 794 (Ind. 2004).

173. *Id.* at 837.

174. *Id.* at 839.

175. *Id.* at 839-40.

176. 806 N.E.2d 329 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 969 (Ind. 2004).

177. *Id.* at 331-32.

178. *Id.* at 332-34. Rule 803(8) provides that the

following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . (8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b)

inadmissible under Rule 803(8) because they were investigative reports prepared by an agency, offered in a case in which it is a party. The court noted that a three-part test exists for whether a record of a public agency constitutes an investigative report: “1) whether the report contains findings which address a materially contested issue in the case; 2) whether the record or report contains factual findings; and 3) whether the report was prepared for advocacy purposes or in anticipation of litigation.”¹⁷⁹ Because the records in question were not prepared for advocacy or purposes of litigation, they were not investigative reports and therefore were admissible.¹⁸⁰

K. Statements Given Under Oath, Outside the Presence of a Jury

In *Allen v. State*,¹⁸¹ Allen appealed his convictions for murder and robbery, claiming the trial court erred when it excluded testimony of a witness that persons other than Allen were the perpetrators of the crimes. The witness testified outside the presence of the jury, but under oath and subject to cross-examination by the prosecution. The witness eventually balked at testifying before the jury and refused to testify further.¹⁸²

Allen failed to object or make an offer of proof on the record for admission of the testimony. The witness was not cross-examined, and the testimony was halted prior to the end of direct examination.¹⁸³ The court ruled that Allen had not waived the issue because there was no basis for objection to the trial court’s admonishment of the jury to ignore the witness’s partial testimony and because Allen had clearly set forth the basis for the witness to testify at trial.¹⁸⁴ Because the testimony was “exculpatory, unique, and critical to Allen’s defense,”¹⁸⁵ the court held that Allen had the right to present a complete defense and reversed the convictions.¹⁸⁶

investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

IND. EVID. R. 803(8).

179. *Bailey*, 806 N.E.2d at 333 (citing *Shepherd v. State*, 690 N.E.2d 318, 326 (Ind. Ct. App. 1997) (citations omitted)).

180. *Id.* at 334.

181. 813 N.E.2d 349 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 980 (Ind. 2004).

182. *Id.* at 362-63.

183. *Id.* at 363.

184. *Id.*

185. *Id.*

186. *Id.*

VII. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

A. Labels Under the Best Evidence Rule

In *Lawson v. State*,¹⁸⁷ Lawson challenged his convictions for illegal possession and illegal consumption of alcohol. Lawson claimed that the trial court violated Rule 1002, the best evidence rule, when it allowed a police officer to testify that the bottles seized from Lawson's vehicle were labeled "Budweiser" and "Bud Light."¹⁸⁸

In a case of first impression on whether the label on a chattel is subject to Rule 1002, the court held that the purpose of the best evidence rule is to avoid the substantial hazard of inaccuracy in items such as wills or other complex writings.¹⁸⁹ Here, a branding or other easily identifiable mark rendered the risk of inaccuracy low and the officer's testimony was allowable, although a second prong of the analysis should involve ease or difficulty of production.¹⁹⁰

B. Evidence of Lost Insurance Policies

In *PSI Energy, Inc.*,¹⁹¹ discussed *supra*, PSI offered evidence of lost insurance policies providing excess coverage. The trial court excluded as speculative expert testimony regarding the probable existence of the policies as well as the probable terms of such coverage. PSI presented secondary evidence of the policies, such as payment invoices and references to the coverage in internal business documents.¹⁹²

Rule 1004 provides that where an original writing is lost or destroyed, other evidence of the contents of the writing can be presented, unless the proponent of the contents acted in bad faith.¹⁹³ The court noted that PSI had submitted secondary evidence regarding the existence of the lost policies, including periods of coverage and limits. PSI had also submitted all but one of the underlying policies. The court held that PSI had submitted sufficient evidence to raise a genuine issue of material fact, making the trial court's grant of summary judgment improper.¹⁹⁴ The expert witness had used the evidence presented and

187. 803 N.E.2d 237 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 802 (Ind. 2004).

188. *Id.* at 240. Rule 1002 states that to prove "the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." IND. EVID. R. 1002.

189. *Lawson*, 803 N.E.2d at 241.

190. *Id.* (following *United States v. Duffy*, 454 F.2d 809 (5th Cir. 1972)). However, the court did question why the bottles in Lawson's immediate area were not introduced at trial. *Id.*

191. 801 N.E.2d 705 (Ind. Ct. App. 2004).

192. *Id.* at 720.

193. Rule 1004 states that an "original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." IND. EVID. R. 1004.

194. *PSI Energy, Inc.*, 801 N.E.2d at 722.

his knowledge of the insurance industry to form his opinion. On remand, PSI would be required to demonstrate, by a preponderance of the evidence, the substance of the relevant policy provisions.¹⁹⁵

C. Admission of Incomplete Documents

In *Belcher v. State*,¹⁹⁶ Belcher appealed his conviction for criminal trespass. He argued that the trial court improperly admitted a copy of a notice of trespass because portions of the original document had been covered up when reproducing the copies. Belcher claimed this was a violation of Rule 1003.¹⁹⁷

Because the covered portions of the document were relevant to the charges against Belcher, the court held the admission of the document to have been error.¹⁹⁸ However, the error was harmless as Belcher testified at trial as to the missing contents.¹⁹⁹

CONCLUSION

The Indiana Rules of Evidence have now entered a second decade of existence. The Rules continue to be further defined by new cases, statutory interpretation, constitutional interpretation, and other factors, including reaction to cases at the federal level which impact the applicability of the Rules under the United States Constitution. The differences between the Rules and their federal counterparts also continue to develop and become more clear.

This development and maturing of the Rules is likely to continue into the indefinite future as conflicts and situations not yet clearly provided for continue to arise. As the Rules develop, the arguments and cases interpreting them are likely to become more complex as areas are defined and additional fact patterns call for application of the Rules. While the Rules will continue to grow and develop in interpretation, they appear to have provided a solid framework within which evidentiary decisions can be made with some degree of reliability, predictability, and fairness.

195. *Id.*

196. 797 N.E.2d 307 (Ind. Ct. App. 2003).

197. *Id.* at 309. Rule 1003 provides that “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” IND. EVID. R. 1003.

198. *Belcher*, 797 N.E.2d at 310.

199. *Id.*

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

Placing a limit on the scope of a survey article regarding developments in the law pertaining to the regulation and dissolution of family rights and responsibilities is challenging in light of the vast reach of our state law pertaining to families. Accordingly, this Article is primarily limited to developments in the law of Indiana pertaining to the traditional family law areas of dissolution of marriage, paternity, child custody and support, and adoption.¹

I. DISSOLUTION OF MARRIAGE

Indiana courts decided numerous cases involving property distribution, spousal maintenance, settlement agreements, and procedural matters during the current survey. The following discussion considers some cases of note involving the topic.

A. Property Distribution

1. *Marital Asset Issues*.—Three broad questions encompass the substantive law of property distribution in a dissolution of marriage action: Is it property, and, if so, marital property? What is the value of the property? How should the property be divided?²

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1. Indiana's "Family Law" contains ten articles expressly identified as such in Title 31 of the Indiana Code. The subjects range from regulation of marriage, prenuptial agreements and paternity through divorce, child support, custody, adoption, and human reproduction just to name major topics. Another eleven articles of Title 31 are specifically delineated as "Juvenile Law." See IND. CODE § 31-9-2-72 (2004) ("Juvenile Law" refers to [Ind. Code Section] 31-30 through 31-40."). One hundred forty-six sections of definitions are contained in an additional article of Title 31 applying to both family and juvenile law. Sprinkled throughout fifteen other titles of the Indiana Code are provisions governing criminal offenses against children and the family, children's protection services, marriage and family therapists, and trust and fiduciaries to mention just a few family-related topics. Finally, every legal proceeding in Indiana regarding child support or visitation is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and Parenting Time Guidelines.

2. It is well established in Indiana that, unless excluded by statute, case law or prenuptial agreement, all assets acquired before or during the marriage are marital assets regardless of how titled and which spouse acquired the property. "'Property,' for purposes of IC 31-15, IC 31-16, and

A recent case dealing with includability in the marital estate is *Benjamin v. Benjamin*.³ Mr. Benjamin was a former lawyer who had tendered his resignation from the bar to the Indiana Supreme Court in settlement of a disciplinary complaint. As consideration for representing him with regard to the disciplinary action, he assigned to the law firm representing him attorneys' fees he was entitled to receive under existing legal services contracts. Wife claimed that this assignment involved a marital asset and thus requested that the trial court award her one-half of the fees that Husband had assigned. She prevailed. On appeal Husband contended it was error for the trial court to treat the legal fees he had assigned as a marital asset, arguing that the award of the assigned attorneys' fees was in violation of the rules of professional conduct because the award made Wife, who was a non-lawyer, a partner in his legal business by impermissibly permitting her to share in fees. The appellate court was not persuaded.

Citing *Landau v. Bailey*⁴ for the proposition that a professional practice may have value for purposes of marital asset distribution, the court noted the evidence showed that the only remaining economic value of Mr. Benjamin's law practice at the time of the final hearing was "embodied within the legal fees Husband was entitled to receive under the legal services contracts."⁵ The court went on to hold that the assignment of fees to the law firm that had represented him amounted to the encumbering of a marital asset and concluded that the trial court properly

IC 31-17, means all the assets of either party or both parties. . . ." IND. CODE § 31-9-2-98b(3). As if to reinforce the definition of property for purposes of divorce, Indiana Code section 31-15-7-4(a), provides:

In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties, whether:

- (1) owned by either spouse before the marriage;
- (2) acquired by either spouse in his or her own right:
 - (A) after the marriage; and
 - (B) before final separation of the parties; or
- (3) acquired by their joint efforts.

IND. CODE § 31-15-7-4(a). *Thompson v. Thompson*, 811 N.E.2d 888 (Ind. Ct. App. 2004), refers to property division as a two-step process, obviously omitting valuation which is a crucial step nonetheless:

The division of marital property in Indiana is a two-step process. The trial court must first determine what property must be included in the estate. Included within the marital estate is all the property acquired by the joint efforts of the parties. With certain limited exceptions, this "one pot" theory specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide an award. Only property acquired by an individual spouse after the final separation date is excluded from the marital estate. After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable.

Id. at 912 (citations omitted); *see also* *Huber v. Huber*, 586 N.E.2d 887 (Ind. Ct. App. 1992).

3. 798 N.E.2d 881 (Ind. Ct. App. 2003).

4. 629 N.E.2d 264, 266 (Ind. Ct. App. 1994).

5. *Benjamin*, 798 NE2d at 887.

awarded half of the fees to Wife.⁶

One of a number of issues raised by Husband in *Thompson v. Thompson*⁷ was the distribution by the trial court to Husband of debts, amounting to \$10,000, for counseling and medical expense, which were incurred after the date of separation by Wife.⁸ Husband argued on appeal that this “constituted an impermissible transfer of a debt arising after the filing of the decree of dissolution.”⁹ The court of appeals agreed with Husband, holding that it is well established in Indiana that debts incurred by a party to the dissolution after the filing of the dissolution petition are not part of the marital estate.¹⁰

The case of *Severs v. Severs*¹¹ resolved the issue of whether Social Security Disability Insurance (“SSDI”) benefits are marital property. The parties were married in 1977 and a Decree of Dissolution was entered in August 2003. In 2002, Husband had a heart attack and, as a result, he began receiving the disability benefits in addition to VA benefits. In the decree of dissolution, the trial court determined that the VA benefits were not marital assets because Husband’s eligibility for them did not require a financial payment or contribution from marital assets. However, the trial court found that Husband’s SSDI payments were marital property and granted Wife forty percent of all future SSDI payments made to Husband. The includability of the SSDI payments in the marital estate was the sole question presented on appeal.¹² The court of appeals noted that no prior Indiana cases existed concerning the inclusion of social security disability payments as marital property.¹³ Accordingly, the court went on to review the Indiana decisions that have been decided in the “general area of

6. *Id.*

7. *Thompson*, 811 N.E.2d at 888.

8. *Id.* at 913. Apparently, Husband was not ordered to pay such expenses of Wife under the provisional orders. *Id.* at 898. Wife was not entitled to post-decree spousal maintenance. *Id.* at 910.

9. *Id.* at 913.

10. *Id.* (citing *In re the Marriage of Moore*, 695 N.E.2d 1004, 1009 (Ind. Ct. App. 1998); *Fuehrer v. Fuehrer*, 651 N.E.2d 1171, 1174 (Ind. Ct. App. 1995)). Wife argued, interestingly, that the “after acquired debt” rule should not apply because of the “doctrine of necessities” which can make one spouse responsible for the necessities of the other spouse. *Id.* In holding that the “doctrine of necessities” did not apply in this case, the court of appeals noted that the doctrine “only renders the non-debtor spouse *secondarily* liable for debt.” *Id.* The doctrine can only be applied if the “debtor-spouse” is unable to meet his or her own personal needs or pay his or her own obligations. The court further stated that *Moore* and *Fuehrer* both stand for the proposition that the “doctrine of necessities” does not change the rule that “the marital estate closes on the date the dissolution petition was filed.” *Id.*

11. 813 N.E.2d 812 (Ind. Ct. App. 2004).

12. *Id.* at 813. The court of appeals noted that the parties did not address the potential application of 42 U.S.C. § 407(a) to the facts of the case. Section 407(a) prohibits the transfer or assignment “at law or in equity” of these benefits. 42 U.S.C. § 407(a) (2000). Child support or the support of a spouse are exceptions to the rule, however. *See id.* § 659.

13. *Severs*, 813 N.E.2d at 813.

disability payments which may constitute marital property.”¹⁴

In *Severs*, Wife acknowledged that future earnings are not a divisible asset and that Husband’s SSDI payments “are clearly to replace future earnings.”¹⁵ Her argument, however, was that the payments should be in the marital pot because they were paid for by Husband’s payroll taxes which deprived the family of the use of the funds during the marriage.¹⁶ The court of appeals rejected this argument concluding that the payroll tax was simply a tax imposed upon all employees by the federal government.¹⁷ As such, they did not constitute a voluntary contribution by Husband to secure a benefit that depleted the marital property.¹⁸ Thus, Social Security disability benefits received by Husband were not marital property.

The last significant case involving marital property concerns an antenuptial agreement. In the case of *Schmidt v. Schmidt*,¹⁹ the parties had entered into an antenuptial agreement five days prior to their marriage. Numerous sections in the parties’ agreement provided that the parties’ individually held property would remain separate property. However, a later section in the agreement appeared to provide that, upon dissolution of marriage, all other sections of the agreement were no longer applicable (i.e., that the sections pertaining to separately held property apply only on death of one of the parties). This was, arguably, a ridiculous result because such an interpretation would treat a divorcing spouse better than a spouse who remained married until death.

During the proceedings below, Husband filed a request for declaratory judgment, apparently seeking interpretation of the agreement while claiming that it was unambiguous.²⁰ Wife also contended that the agreement was unambiguous but that it called for the non-recognition of separate property upon the initiation

14. *Id.* at 813. In *Gnerlich v. Gnerlich*, 558 N.E.2d 285, 288 (Ind. Ct. App. 1989), it was decided that the disability payments received by Husband were marital property because Husband had made monthly payments to an insurance company for the disability plan. In contrast, the court in *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993), held that workers’ compensation disability benefits were not marital property because they were to replace future earnings. The *Leisure* court distinguished *Gnerlich* because the husband used marital assets to pay for the disability benefits, whereas the husband in *Leisure* did not. *Leisure*, 605 N.E.2d at 758. The case of *Jendreas v. Jendreas*, 664 N.E.2d 867 (Ind. Ct. App. 1996) involved a situation where Husband was receiving both SSDI and disability under a union pension, both of which were found by the trial court not to be marital property. No challenge was made regarding SSDI but on appeal Wife contended that the union benefits should have been considered marital property. *Jendreas*, 664 N.E.2d at 370. The *Jendreas* court applied the *Leisure* holding that the union disability benefits were not marital property because they represented future income and no marital assets were used to purchase the benefits. *Id.* at 371.

15. *Severs*, 813 N.E.2d at 814.

16. *Id.*

17. *Id.*

18. *Id.*

19. 812 N.E.2d 1074 (Ind. Ct. App. 2004).

20. *Id.* at 1078.

of a divorce proceeding.²¹ The trial court found that the parties agreed that the agreement was unambiguous, that the intent of the parties could be found within the four corners of the document, and that the intent was to recognize separate property in the event of a dissolution action.²² The appellate court's decision demonstrates the clear strategic error of not acknowledging the patent ambiguity of the agreement.

On appeal, Wife argued that the trial court did not follow established rules for the construction of contracts and the court of appeals agreed.

Antenuptial agreements are to be construed according to principles applicable to the construction of contracts. To interpret a contract, a court first considers the parties' intent as expressed in the language of the contract. The court must read all of the contractual provisions as a whole to accept an interpretation that harmonizes the contract's words and phrases and gives effect to the parties' intentions as established at the time they entered the contract. If the language of the agreement is unambiguous, the intent of the parties must be determined from the four corners of the document. The terms of a contract are ambiguous only when reasonably intelligent persons would honestly differ as to the meaning of those terms.²³

In effect, Husband was the victim of his own argument because the appellate court agreed with the trial court that the agreement was unambiguous, but reversed the trial court's finding and held that the unambiguous agreement abolished separate property upon dissolution of marriage.²⁴ Thus, Husband was left with a prenuptial agreement that would only protect his separate property in the event that he died married to Wife, but not if they divorced. Judge Darden, concurring in the result with a separate opinion, would not have allowed such an obviously unintended result to have occurred without an evidentiary hearing for extrinsic evidence of the parties' intent; to do this required acknowledging the obvious—that the agreement was ambiguous:

I concur in result because I believe the trial court's grant of declaratory relief in favor of the husband was error. In my opinion, reversal is warranted based upon the ambiguity apparent upon the face of Section Thirteen. Because I find Section Thirteen to be ambiguous, I would remand to the trial court to hear evidence concerning the parties' intent as to the meaning of Section Thirteen when they entered into the prenuptial agreement.²⁵

2. *Valuation Issues.*—*Thompson v. Thompson*, which is more than forty

21. *Id.*

22. *Id.*

23. *Id.* at 1080 (citations omitted). In a footnote the court noted that extrinsic evidence of the parties' intent could not be submitted because the agreement was unambiguous. *Id.* at 1080 n.1.

24. *Id.* at 1081.

25. *Id.* at 1083-84 (Darden, J., concurring).

pages long, has a little bit of something for everyone, including a virtual primer on valuation issues.²⁶ The most notable valuation issue involved post-filing changes in the value of retirement benefits due to post-filing contributions and appreciation prior to the final hearing.²⁷

Essentially, the trial court included in the valuation of Husband's retirement benefits the post-filing contributions by Husband in addition to the post-filing appreciation.²⁸ The court, on appeal, noted:

The difficulty encountered with the valuation at bar is that the increase in the retirement benefit's post-filing value derives from two sources: (1) wages withheld from the beneficiary's post-filing income, and (2) the increases attributable to the interest accumulated from the benefit's value at the time of separation. The former increase is the result of the beneficiary's contribution from non-marital property and may not be divided as a marital asset. The latter increase is the result of the benefit's mere existence and is divisible as marital property.²⁹

The court went on to hold that trial courts should choose a date between the final separation and the final hearing for purposes of valuing the retirement benefit and, based on the date and the evidence of record, assign a value after subtracting any contribution after the date of final separation.³⁰

Beike v. Beike,³¹ dealt with a former Husband's motion for relief from the dissolution decree due to a decline in the value of his pension benefits. The parties had agreed that former Wife would be entitled to thirty-six percent of the value of the vested pension through National Steel as of the date of final separation in December 1996. The trial court entered a final order approving the agreement and a qualified domestic relations order ("QDRO") was entered in October 1996. National Steel declared bankruptcy in March 2002 and the Pension Benefit Guarantee Corporation ("PBGC") then became responsible for the former Husband's pension, which decreased in value approximately sixty-two percent. In August 2003, former Husband filed a motion for relief from the order asking the trial court to modify the QDRO to reflect the change in circumstances brought about by the employer's bankruptcy. The trial court ruled in former Husband's favor and reduced former Wife's monthly payment accordingly. She appealed.³²

On appeal, the court noted that the QDRO did not contain express language "stating that the parties would not share in the risks and rewards associated with [former Husband's] pension benefits" and, thus, the court held that the trial court

26. *Thompson v. Thompson*, 811 N.E.2d 888, 917-19 (Ind. Ct. App. 2004).

27. *Id.*

28. *Id.* at 917.

29. *Id.* at 918 (citation omitted).

30. *Id.*

31. 805 N.E.2d 1265 (Ind. Ct. App. 2004).

32. *Id.* at 1266-67.

did not abuse its discretion in adjusting the pension benefits.³³ It is interesting to note that the court of appeals in a footnote stated that if the final order had set the amount the former Wife was to receive in dollars, as opposed to awarding a percentage of the pension plan, the “result of this case may have been different.”³⁴ But because she was to receive a percentage of the pension plan “it was within the trial court’s discretion to ensure that the percentages reflected the decrease in the value of [Husband’s] pension plan.”³⁵

3. *Distribution Issues.*—*Thompson v. Thompson*, in addition to asset inclusion and valuation issues, also involved a claim by Husband on appeal that the trial court injected fault into its asset distribution.³⁶ The proceedings below were highly contentious with multiple contempt findings against Husband. At the final hearing, Wife was awarded seventy percent of the marital estate and Husband was awarded thirty percent. Husband appealed contending that this division was clearly erroneous.³⁷

33. *Id.* at 1269.

34. *Id.* at 1269 n.2. *But see* Case v. Case, 794 N.E.2d 514 (Ind. Ct. App. 2003) (setting the amounts that each party was to receive from a retirement account which subsequently declined in value). In *Case*, Husband’s motion for relief also was granted using the same rationale as *Beike*, i.e., that there was no express allocation of risk or rewards between the parties due to changes in value of the asset. In *Case*, the trial court converted the dollar amounts in its original order to percentages and, then, applied the percentages to the decreased value of the retirement account. Affirming the decision below, the appellate court noted that decline in the plan’s value was not caused by the action of Husband. *Case*, 794 N.E.2d at 516. Increases in the value of retirement benefits have been held to not form the basis for relief from judgment on the same rationale as *Beike* and *Case*. In *Niccum v. Niccum*, 734 N.E.2d 637 (Ind. Ct. App. 2000), Wife was awarded a set amount of a retirement benefit which appreciated in value without any additional contributions from Husband. Husband moved for relief from the judgment. Ultimately, it was held that Wife was entitled to a portion of the growth occurring between the time of the court’s order and the effectuation of the QDRO, the theory being “absent express language stating otherwise, the settlement agreement of the parties implicitly contemplated both parties sharing all of the rewards and risks associated with an investment plan.” *Niccum*, 734 N.E.2d at 640.

35. *Bieke*, 794 N.E.2d at 1269 n.2.

36. *Thompson*, 811 N.E.2d at 921-22.

37. *Id.* at 920 (citing IND. CODE § 31-15-7-5, concerning the statutory presumption of an equal split and the factors for rebuttal of the presumption). The court quoted Indiana Code section 31-15-7-5, which states:

The [trial] court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of property, regardless of whether the contribution was income providing.
- (2) The extent to which the property was acquired by each spouse.
 - (A) before the marriage; or

On appeal it was noted by the court that, in Indiana, “[f]ault may not be used as a basis to support an unequal division of the marital estate.”³⁸ The basis of Husband’s argument was the following finding in the trial court’s property distribution order: “Because of Wife’s responsibility to the family and the household and Husband’s lack of responsibility and his behavior, the court finds that Husband’s behavior had caused Wife’s income to be depleted over the years.”³⁹ However, other language in the court’s order clearly showed that the trial court felt that Wife’s income was reduced because of her responsibilities with the children, that she had supported the family financially with the payment of debts and that Husband had a superior earning capacity.⁴⁰ The court of appeals went on to hold that it did not characterize the language of the trial court as a fault-based finding. Rather, the court of appeals felt that the trial court awarded a greater division to Wife based upon her economic condition and earning abilities.⁴¹

The case of *Poppe v. Jabaay*,⁴² involved a post-decree modification of a portion of the trial court’s dissolution decree dividing property at the request of one of the parties who did not claim fraud or any of the other grounds for relief from judgment under the Indiana Rules for Trial Procedure.⁴³ The trial court’s decree of dissolution clearly ordered the marital home to be sold, and gave Wife

(B) through inheritance or gift.

(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and,

(B) a final determination of the property rights of the parties.

Id. at 920-21 (quoting IND. CODE § 31-15-7-5 (1998)). The court continued, “[i]f the trial court finds reasons to rebut the presumption of equal division of the marital assets, it may divide the assets unevenly provided it sets forth its reasons for doing so.” *Id.* at 921.

38. *Id.* at 921 (citing *R.E.G. v. L.M.G.*, 571 N.E.2d 298, 301 (Ind. Ct. App. 1991) (“we will not tolerate the injection of fault into modern dissolution proceedings”)). Arguably, deviation from the presumption due to dissipation of assets would be a fault-based distribution. *See* IND. CODE § 31-15-7-5(4) (2004).

39. *Beike*, 805 N.E.2d at 922.

40. *Id.*

41. *Id.*

42. 804 N.E.2d 789 (Ind. Ct. App. 2004).

43. *Id.* at 794-95. Indiana Code section 31-15-7-9.1 prohibits revocation or modification of property distribution orders except in the case of fraud asserted no later than 6 years after the order is entered. IND. CODE § 31-15-7-9.1 (2004). However, as noted in *Poppe*, a trial court “may sometimes modify its property division decree under [Indiana Trial Rule (60)(B); however] a court may not do so without a motion by a party and without a hearing.” *Poppe*, 804 N.E.2d at 795.

the opportunity to conduct a “Sale By Owner.” Detailed procedures in the decree provided that if the parties could not agree or if the property did not sell by a certain time, then upon written motion the court would appoint a commissioner to effectuate the sale. The sale did not happen and Husband asked for the appointment of a commissioner. The court appointed a commissioner and both Husband and Wife submitted offers to purchase which were rejected by the commissioner as not being in compliance with the decree. Poppe, a third party, then submitted an offer to purchase the marital residence which the commissioner accepted. Wife then sought to block the sale and asked the court to modify the decree. Poppe intervened. After a hearing, the court ordered the commissioner to sell the property to Wife to effectuate the court’s original intent.⁴⁴ Poppe appealed contending that the trial court had abused its discretion by ordering the sale of the marital home to Wife because the trial court’s order modified the original property division provisions of the decree in the absence of fraud. Wife countered, asserting that the trial court’s modification was justified in order to reflect its original intention.⁴⁵

On appeal, the court noted the strong public policy favoring the finality of marital property divisions. Thus, modification is prohibited in the absence of fraud in order to “eliminate vexatious litigation which often accompanies the dissolution of a marriage.”⁴⁶ However, the court noted that, while the statute does not specifically grant authority for the court to modify, rescind, or grant relief from the division of property in the absence of fraud, the statute does not preclude a Trial Rule 60(b) motion for relief from judgment.⁴⁷ The court went on to agree with Poppe that the trial court did indeed modify its original dissolution decree without finding any evidence of fraud as required by statute, and without a motion for relief from judgment as required by the trial rule.⁴⁸

B. Spousal Maintenance Issues

A trial court’s mischaracterization of property distribution as “rehabilitative maintenance” does not make it so, according to *Benjamin v. Benjamin*.⁴⁹ Even though she had not requested it, the trial court awarded Wife \$400,000 as “rehabilitative maintenance.”⁵⁰ Husband argued on appeal that the award was error not only because she did not request the rehabilitative maintenance, but also because she did not meet the evidentiary burden required by the statute for an award of rehabilitative maintenance.⁵¹ Wife agreed that the \$400,000 could not

44. *Poppe*, 804 N.E.2d at 791-92.

45. *Id.* at 793.

46. *Id.* (citing *Lankenau v. Lankeuau*, 365 N.E.2d 1241, 1244 (Ind. Ct. App. 1977)).

47. *Id.*

48. *Id.* at 793-95.

49. *Benjamin v. Benjamin*, 798 N.E.2d 881, 885 (Ind. Ct. App. 2003).

50. *Id.* at 887.

51. *Id.* Post-decree spousal maintenance may be awarded by the trial court in a dissolution action where the recipient spouse is physically or mentally incapacitated so that it impairs his/her

be deemed rehabilitative maintenance, but instead argued that it should be sustained as a valid property distribution. Apparently, at the final hearing she requested that the trial court award her “an alimony judgment” in the sum of \$400,000 because of Husband’s conduct in dissipating marital assets which was amply supported by the evidence. The trial court denominated the award as a “maintenance award” because Indiana does not have provisions for the awarding of alimony.⁵²

The court of appeals sustained the \$400,000 award reasoning that “characterizing an award as maintenance does not make it so.”⁵³ The court of appeals stated that the record clearly indicated that the \$400,000 award was intended to be an award representing Wife’s distribution of the marital estate. The trial court had held that the evidence supporting Husband’s dissipation of assets had justified the distribution of the marital assets and debts.⁵⁴

In *Thompson v. Thompson*,⁵⁵ the trial court required Husband to pay Wife’s COBRA medical coverage. Husband appealed contending that this amounted to “an impermissible award of spousal maintenance.”⁵⁶ On appeal, the court agreed that requiring Husband to pay Wife’s COBRA benefits was “an improper award of spousal maintenance,”⁵⁷ observing that:

ability to support him or herself; if the recipient spouse is the custodian of an incapacitated child which requires the spouse to forego employment and he or she lacks sufficient property to provide for his or her needs and “rehabilitative maintenance” to improve job market ability. IND. CODE § 31-15-7-2 (2004). Concerning “rehabilitative maintenance,” Indiana Code section 31-15-7-2(3) provides:

(3) After considering:

- (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
- (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of home making or child care responsibilities, or both;
- (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
- (D) the time and expense to acquire sufficient education or training to enable the spouse seeking maintenance to find appropriate employment;

a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

Id. § 31-15-7-2(3).

52. *Benjamin*, 798 N.E.2d at 887.

53. *Id.* at 888 (citing *Millar v. Millar*, 581 N.E.2d 986, 987 n.1 (Ind. Ct. App. 1991), *rev’d as to remedy ordered*, 593 N.E.2d 1182, 1183 (Ind. 1992)).

54. *Id.*

55. 811 N.E.2d 888 (Ind. Ct. App. 2004).

56. *Id.* at 908.

57. *Id.* at 910. The court indicated that an order of post-dissolution periodic payments from

Indiana courts are very restricted in their ability to award spousal maintenance. . . . (Spousal maintenance may only be ordered when the court finds (1) a spouse to be physically or mentally incapacitated, (2) a spouse must forego employment in order to care for a child with a physical or mental incapacity, or (3) a spouse needs support while acquiring sufficient education or training to get an appropriate job.)⁵⁸

The court noted that Wife's health insurance benefits would terminate upon her death and that the COBRA payments would be made from future income. Those facts, coupled with the absence of evidence in the record that Wife had any disability or could not earn the substantial income she earned prior to separation resulted in the court reversing the order for COBRA coverage.⁵⁹

A related issue in *Thompson* concerned the trial court's order that Husband pay Wife the sum of \$70,000 so that Wife would realize seventy percent of the marital estate. The problem was that the trial court provided in its Order that this award was in the nature of alimony or maintenance and was not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(5) and 523(a)(15).⁶⁰

On appeal, the court observed that, because state courts have concurrent jurisdiction with federal courts to determine what constitutes non-dischargeable maintenance or support, state appellate review was premissible.⁶¹ The court of

one spouse to another does not always amount to spousal maintenance and can be considered property settlement if:

- (1) The payments are for a sum certain payable over a definite period of time;
- (2) There are no provisions for modification based upon future events;
- (3) The obligation to make the payments survives the death of the parties;
- (4) The provisions call for interest; and
- (5) The award does not exceed the value of the marital assets at the time of the dissolution.

Id. at 909. The court noted that the following factors tend to indicate that a periodic post-dissolution payment constitutes an award of spousal maintenance:

- (1) The designation of a payment as spousal maintenance;
- (2) The presence of provisions terminating the payments upon the death of either party;
- (3) The presence of orders requiring payments made from future income;
- (4) The presence of a provision for termination upon marriage;
- (5) The presence of provisions calling for modification based upon future events; and
- (6) The presence of orders requiring payments for an indefinite period of time.

Id.

58. *Id.* at 909 (citing *Brinkman v. Brinkman*, 722 N.E.2d 441, 445-46 (Ind. Ct. App. 2002); *Voigt v. Voigt*, 670 N.E.2d 1271, 1275-77 (Ind. 1996)).

59. *Id.* at 910.

60. *Id.* Section 523(a)(5) excepts from discharge alimony, maintenance, and support of a spouse or child. 11 U.S.C. § 523(a)(5) (2000). Section (a)(15) exempts from discharge debts that may more properly be described as arising from a court's order respecting property distribution. *Id.* § 523(a)(15).

61. *Thompson*, 811 N.E.2d at 911 (citing *Goodman v. Goodman*, 754 N.E.2d 595, 602 (Ind.

appeals went on to hold that the trial court could not make the award part of its order non-dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5) because there was no evidence to support a finding that Wife was entitled to spousal maintenance and because Indiana does not recognize alimony.⁶²

In the case of *Augspurger v. Hudson*,⁶³ the court was called upon to determine whether the payment of a set amount for future medical expenses was a proper maintenance award. The evidence at trial showed Wife to be disabled and the trial court awarded Wife weekly spousal maintenance payments, as well as \$6000 for future medical expenses. Husband appealed. Among other challenges, Husband contended the \$6000 award to Wife for future medical treatment was a post-dissolution debt because it had not been specifically denominated maintenance or support.⁶⁴

The court determined, however, it was clear that the award for future medical treatment constituted an award of maintenance.⁶⁵ The trial court had made ample findings of Wife's incapacity. The court said that if the trial court makes a finding of mental or physical incapacity materially affecting the person's ability to be self-supporting, an award such as one in this case could be considered support or maintenance without specifically denominating it as support or maintenance.⁶⁶

II. CHILD CUSTODY AND PARENTING TIME

A. Grandparent Visitation

Several cases during the survey period involved the issue of grandparent visitation with some interesting twists. In *Wilson v. Cloum*,⁶⁷ the maternal grandparents were awarded guardianship of their daughter's child after their daughter was killed by her husband, the son of the paternal grandmother. The maternal grandparents then denied the paternal grandmother access to the child. Prior to this the paternal grandmother had frequent visitation and contact with the child. The paternal grandmother petitioned for visitation with the child and the

Ct. App. 2001)).

62. *Id.* The court also went on to say that, while the \$70,000 payment may not be dischargeable under 11 U.S.C. § 523(a)(15), that issue could only be determined during the course of a bankruptcy upon the filing by the creditor-spouse of a petition to determine non-dischargeability. *Id.* at 911-12.

63. 802 N.E.2d 503 (Ind. Ct. App. 2004).

64. *Id.* at 510-11.

65. *Id.* at 511.

66. *Id.* at 511 & n.6 (citing *Coster v. Coster*, 452 N.E.2d 397, 403 (Ind. Ct. App. 1983)). The court noted that *Coster* was incorrect to the extent that it held that an award merely designated as support or maintenance without specific findings was sufficient to establish the award as support or maintenance.

67. 797 N.E.2d 288 (Ind. Ct. App. 2003).

trial court granted the paternal grandmother's petition.⁶⁸ The maternal grandparents appealed.

The maternal grandparents argued that the trial court failed to presume that their decision regarding visitation with the child was in that child's best interest and it failed to give their decision special weight.⁶⁹ The court held that there is a presumption that the trial court followed the law in the exercise of its discretion and discussed *McCune v. Frey*,⁷⁰ in setting forth their requirements for a decree granting or denying grandparent visitation.⁷¹

Holding that the maternal grandparents' contention merely sought reweighing the evidence, the decision was affirmed. Interestingly, the trial court ordered that the paternal grandmother should be the babysitter for the child. The court of appeals vacated that part of the order stating that:

Clearly, choosing the babysitter is an everyday responsibility of child rearing in which the state has no special interest in substituting its

68. *Id.* at 290. Indiana Code section 31-17-5-1 provides that

(a) A child's grandparent may seek visitation rights if:

- (1) the child's parent is deceased;
- (2) the marriage of the child's parents has been dissolved in Indiana; or
- (3) subject to subsection (b) the child was born out of wedlock.

(b) A court may not grant visitation rights to a parental grandparent of a child who is born out of wedlock under subsection (a)(3) if the child's father has not established paternity in relation to the child.

IND. CODE § 31-17-5-1 (2004). Indiana Code section 31-17-5-2 provides

(a) The court may grant visitation rights if the court determines that visitation rights are in the best interests of the child;

(b) In determining the best interest of the child under this section, the court may consider whether a grandparent has had or has attempted to have meaningful contact with the child.

Id. § 31-17-5-2(a)-(b).

69. The maternal grandparents relied upon *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. Ct. App. 2001). *Crafton* held that the trial court must presume that a parent's decision with respect to visitation is in the child's best interest and that the trial court must give "special weight" to the parent's decision regarding visitation. *Id.* at 98-99. The *Crafton* court relied upon the United States Supreme Court's decision in *Troxel v. Granville*, 50 U.S. 57 (2000).

70. 783 N.E.2d 752, 757 (Ind. Ct. App. 2003).

71. *Wilson*, 797 N.E.2d at 291. *Wilson* cited *Frey* for the proposition that when a trial court enters a decree granting or denying grandparent visitation, it must set forth findings of fact and conclusions of law in said decree. *Wilson* stated:

In those findings and conclusions, the trial court should address: (1) the presumption that a fit parent acts in his or her child's best interest; (2) the special weight that must be given to a fit parent's decision to deny or limit visitation; (3) whether the grandparent has established that visitation is in the child's best interest; and (4) whether the parent has denied visitation or has simply limited visitation.

Id. at 291 n.2.

judgment. It is one thing for the trial court to grant Grandmother visitation with [the child] under Indiana Code Section 31-17-5-2; it is quite another for the trial court to dictate [maternal grandparents] choice of a babysitter. We therefore vacate that portion of the trial court's order.⁷²

The case of *Maser v. Hicks*,⁷³ involved a case where the minor child's maternal step-grandfather filed a petition for grandparent visitation. The trial court granted the petition and Father appealed. The court of appeals reversed and remanded holding that the step-grandfather was not a "grandparent" for the purposes of the Grandparent Visitation Act.⁷⁴ Mother and Father divorced in 1995 and Mother was granted custody of the minor child. Mother died in September 2003 and after her death, the minor child went to live with the step-grandfather. Subsequently, Father sought and gained custody of the minor child and the step-grandfather petitioned for grandparent visitation. The trial court held a hearing on the step-grandfather's petition and granted the step-grandfather's petition. Father argued on appeal that the trial court's order was erroneous because the step-grandfather lacked standing to petition for visitation under the grandparent visitation act.⁷⁵ In other words, it was Father's contention that the step-grandfather was not a "grandparent" under the terms of the Act. In addressing this question, the court stated that: "In order to seek visitation rights with grandchildren, grandparents must have standing to seek those rights under the Grandparent Visitation Act. . . . If grandparents lack standing, their petition must be denied as a matter of law."⁷⁶ The court noted that Indiana Code section 31-9-2-77 defines "maternal/paternal grandparents" as including: "(1) the adoptive parent of the child's parent; (2) the parent of the child's adoptive parent; and (3) the parent of the child's parent."⁷⁷

The court then went on to hold that the step-grandfather "does not fit into any of the categories in the statutory definition of a grandparent entitled to petition for grandparent visitation rights."⁷⁸ By declining to expand the Grandparent Visitation Act to include step-grandparents as "grandparents," the court held that the Grandparent Visitation Act applies only to requests for visitation made by the grandparents.⁷⁹

B. Jurisdiction

*In re Custody of A.N.W.*⁸⁰ involved a couple who were divorced in Texas.

72. *Id.* at 292.

73. 809 N.E.2d 429, 430 (Ind. Ct. App. 2004).

74. *Id.* at 432.

75. *Id.* at 431.

76. *Id.* at 432 (citing *In re J.D.G.*, 756 N.E.2d 509, 511 (Ind. Ct. App. 2001)).

77. *Id.* (citing IND. CODE § 31-9-2-77 (1998)).

78. *Id.*

79. *Id.* at 433.

80. 798 N.E.2d 556, 558 (Ind. Ct. App. 2003).

Husband was granted custody of the child and, subsequently, the child came to live with Mother in Indiana. Mother enrolled the child in school. After approximately eighteen months, Father showed up unannounced at the child's school during school hours. Mother immediately requested an emergency hearing because Father was now in Indiana. The trial court, before holding a hearing on Mother's verified petition to transfer and assume jurisdiction and to modify the custody decree from Texas, contacted the presiding judge in Texas by telephone. The court learned that there were no pending proceedings in Texas and the Texas court, upon learning that the child had been living in Indiana and enrolled in school for approximately eighteen months, declined jurisdiction. The Indiana court then assumed jurisdiction over the child. The trial court granted temporary custody to Mother, granted visitation to Father, and ordered that the child not be removed from the state and county until further order of the court. The matter was then set for final hearing. Father filed a motion to correct errors asserting that the Texas court retained jurisdiction. The trial court denied the motion to correct errors and ordered Father to pay child support pending a final hearing. At the final hearing, Mother was awarded legal and physical custody of the child. Father was ordered to pay child support and was granted visitation.⁸¹

On appeal, Father maintained that the declining of jurisdiction by the Texas court over the telephone was improper because it did not make a written order. Thus, Indiana could not have jurisdiction over the child.⁸² In affirming the trial court, the court of appeals stated that the Uniform Child Custody Jurisdiction Act ("UCCJA") is the "exclusive method of determining the subject matter jurisdiction of a court in a custody dispute with an interstate dimension."⁸³ The court stated that under the UCCJA the court where the child custody matter was initially decided gains exclusive jurisdiction as long as "a significant connection" remains between the controversy and the state.⁸⁴ The first court retains exclusive jurisdiction only until the child and all of the parties have left the state.⁸⁵ That court will have exclusive jurisdiction so long as the significant connection remains or unless that court decides if it will defer jurisdiction to the court of another state which it determines is a more convenient forum to "litigate the issues."⁸⁶ In this case, the Texas court had continuing exclusive jurisdiction despite Mother's relocation to Indiana because Father's continued residence in Texas provided a "significant connection" with the Texas court.⁸⁷ Turning to the inquiry as to whether the telephone conversation between the Indiana court and the Texas court was sufficient for Texas to decline and for Indiana to exercise jurisdiction,⁸⁸ the court held that the telephone conversation, which was made a

81. *Id.* at 560.

82. *Id.*

83. *Id.*

84. *Id.* at 561-62.

85. *Id.*

86. *Id.*

87. *Id.* at 562.

88. Indiana Code section 31-17-3-7(i) provides that "[a]ny communication received from

part of the record by the Indiana court, properly evidenced that the Texas court declined jurisdiction and that the Indiana court rightfully assumed jurisdiction.⁸⁹ The court relied upon Indiana Code section 31-17-3-6(c), which

permits the Indiana court to “communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged. . . .” We find nothing in the Indiana statutes that requires a written order from the court that is declining jurisdiction.⁹⁰

The court, noting that the Texas court did not follow-up the telephone conversation with a written order, suggested that this would have been the better practice but it was not fatal.⁹¹ It would seem that in circumstances like this in the future, it would behoove the Indiana court to request an order from the foreign court declining jurisdiction.

In re Paternity of A.B.,⁹² decided by the supreme court, clarifies the law in Indiana that minimum contacts are necessary to confer in personam jurisdiction in a paternity matter, thereby overruling *In re Paternity of Robinaugh*.⁹³ In *Paternity of A.B.*, Mother filed a petition to establish paternity, child support, and parenting time in Indiana. Father filed a motion to dismiss contending that he had never been physically present in Indiana and, thus, the court had no jurisdiction over him. Mother contended that the UCCJA conferred jurisdiction to establish paternity and to determine custody and parenting time. The trial

another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.” IND. CODE § 31-17-3-7(i) (2004).

89. *In re Custody of A.N.W.*, 798 N.E.2d at 563.

90. *Id.* (quoting IND. CODE § 31-17-3-6(c)).

91. *Id.* at 564. The court also opined that “under the ‘home state’ analysis of the UCCJA, the Indiana court properly exercised jurisdiction over this matter.” *Id.* The court found that the child had lived in Indiana since December 2000; had attended school in Indiana since January 2001; and, that this action was not an issue until April 2002. Thus, Indiana was the home state of the child. *Id.* at 564-65.

92. 813 N.E.2d 1173 (Ind. 2004).

93. 616 N.E.2d 409 (Ind. Ct. App. 1993). *Robinaugh* was a paternity case in which the alleged biological Father filed a petition to establish his paternity and sought custody of the child. The child was born in Indiana and at the time the petition was filed, resided in Indiana. However, both Mother and Father resided in Arizona. Mother’s only contact with Indiana was her “single venture” into the State to give birth. She sought to dismiss, contending that this “single venture” did not satisfy the minimum contacts requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Paternity of A.B.*, 813 N.E.2d at 1175. The court of appeals in *Robinaugh* disagreed with Mother and held that the UCCJL was applicable because, “[c]ustody proceedings are adjudications of status, and as such are an exception to the minimum contacts requirements normally associated with discussions of personal jurisdiction.” *Robinaugh*, 616 N.E.2d at 411. The supreme court did not review *Robinaugh* because transfer had not been requested.

court determined that it lacked personal jurisdiction over the alleged Father and dismissed Mother's petition.⁹⁴ The court of appeals, in a memorandum decision, reversed in part and remanded. Transfer was granted.

On transfer, the supreme court affirmed the decision of the trial court. The supreme court relied on its opinion in the paternity case of *Stidham v. Whelchel*⁹⁵ in which the alleged Father contended he had no minimum contacts with Indiana. The supreme court held that a judgment is violative of the Due Process Clause of the Fourteenth Amendment if it is entered without minimum contacts.⁹⁶ It reiterated its finding in *Stidham*:

A court simply has no power over persons who have no contact with their [sic] territory, unless and until there is a response or an appearance and the lack of personal jurisdiction is not protested. Accordingly, if *Stidham* is correct that no minimum contacts existed, then the Indiana trial court did not have personal jurisdiction over him and its effort to exercise that power was a nullity.⁹⁷

The supreme court went on to point out that in *Paternity of A.B.* the UCCJA was incorrectly applied in *Robinaugh* because the UCCJA did not specifically refer to paternity proceedings.⁹⁸ In contrast to the UCCJA, the court noted that the Uniform Interstate Family Support Act ("UIFSA"), codified at Indiana Code section 31-18-2-1,⁹⁹ does specifically apply to paternity actions and permits an

94. *Paternity of A.B.*, 813 N.E.2d at 1174.

95. 698 N.E.2d 1152 (Ind. 1998).

96. *Paternity of A.B.*, 813 N.E.2d at 1175.

97. *Stidham*, 698 N.E.2d at 1155 (quoted in *Paternity of A.B.*, 813 N.E.2d at 1175).

98. *Paternity of A.B.*, 813 N.E.2d at 1175.

99. *Id.* The UIFSA, Indiana Code section 31-18-2-1 provides:

In a proceeding . . . an Indiana tribunal may exercise personal jurisdiction over a non-resident individual or the individual's guardian or conservator if:

(1) the individual is personally served with notice in Indiana;

(2) the individual submits to the jurisdiction of Indiana by:

(A) consent;

(B) entering an appearance, except for the purpose of contesting jurisdiction;

or

(C) filing a responsive document having the effect of waiving contest to personal jurisdiction;

(3) the individual resided in Indiana with the child;

(4) the individual resided in Indiana and has provided prenatal expenses or support for the child;

(5) the child resides in Indiana as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in Indiana and the child;

(A) has been conceived by the act of intercourse; or

(B) may have been conceived by the act of intercourse if the proceeding is to establish paternity;

(7) the individual asserted paternity of the child in the putative father registry

Indiana trial court to exercise personal jurisdiction pursuant to the minimum contacts listed therein. Therefore, the court determined “the UCCJ[A] cannot be deemed to supersede the due process protections of the Fourteenth Amendment. Upon this issue, *Robinaugh* was incorrectly decided.”¹⁰⁰

The supreme court reversed and vacated the court of appeals decision in *Gamas-Castellanos v. Gamas*.¹⁰¹ The original decree granted in Texas awarded custody to Mother and granted visitation rights to Father. Subsequently, Mother moved to Indiana with the children. Thereafter, she allowed the youngest child to live with Father in the Netherlands. When Father returned to the United States, he and the youngest child moved to Louisiana.

Father then sought an order from a Louisiana court determining custody. Mother traveled to Louisiana, returned the child to Indiana and filed a motion to dismiss in the Louisiana court. The Louisiana court rejected Mother’s argument finding that Louisiana did have jurisdiction because Louisiana was the “home state” of the youngest child, and ordered the return of the child to Father.¹⁰² During the pendency of the Louisiana proceeding, Mother filed a motion to modify in Indiana. The Indiana trial court, contrary to the determination of the Louisiana court, determined that Indiana was the “home state” of both children and that it could exercise jurisdiction over the custody dispute regarding both children. The Indiana Court of Appeals affirmed and transfer was granted to the supreme court which vacated the opinion of the court of appeals.¹⁰³ The supreme court held that “Louisiana exercised jurisdiction in substantial conformity with the UCCJA and, therefore, under Indiana Code [section] 31-17-3-6, [the Indiana trial court] should not have also exercised jurisdiction over custody of the younger child.”¹⁰⁴ The supreme court went on to state that even if the Louisiana court had committed error in determining the “home state issue” the matter was fully and conclusively litigated in Louisiana with both parties participating, and therefore, the Louisiana decision was entitled to full faith and credit in Indiana.¹⁰⁵

The case of *Sudvary v. Mussard*,¹⁰⁶ involved a matter of first impression. The issue was whether a trial court, which had proper jurisdiction under the UCCJA, at the time the party filed a petition to modify custody, lost that

administered by the State Department of Health under IC 31-19-5; or

(8) there is any other basis consistent with the Constitution of the State of Indiana and the Constitution of the United States for the exercise of personal jurisdiction.

IND. CODE § 31-18-2-1 (cited in *Paternity of A.B.*, 813 N.E.2d at 1175 n.2).

100. *Paternity of A.B.*, 813 N.E.2d at 1175-76.

101. 803 N.E.2d 665 (Ind. 2004).

102. *Id.* at 666. The Louisiana court found that under the UCCJA, it lacked jurisdiction to decide custody issues regarding the older child.

103. *Id.*

104. *Id.* This case was expedited by the supreme court because it involved the issue of child custody. Instead of a formal opinion, the supreme court issued a “Dispositive Published Order.” See IND. APP. R. 21(A).

105. *Gamas-Castellanos*, 803 N.E.2d at 666.

106. 804 N.E.2d 854 (Ind. Ct. App. 2004).

jurisdiction when the party moved to another state while the petition was pending.¹⁰⁷

The parties were originally married in Ohio, and after having lived in Indiana for six months, Father filed a petition for dissolution of marriage in Indiana. As part of the decree of dissolution, the trial court ordered that the parties share joint legal custody, with Mother having primary physical custody and Father having visitation. Approximately two years after the decree of dissolution was entered, Father filed a motion to modify the physical custody. While the petition was pending, Father moved from Indiana to Illinois because of a job transfer. Mother did not live in Indiana. Mother moved to dismiss arguing that the trial court lacked jurisdiction under the UCCJA because neither party lived in Indiana. The trial court denied Mother's motion and ordered that Father have physical custody of the child. Mother appealed.¹⁰⁸

Mother argued on appeal that the trial court lost jurisdiction under the UCCJA when Father moved from Indiana to Illinois. Father argued that the trial court properly had jurisdiction because it had jurisdiction when Father filed his petition for modification and once the petition was filed, the trial court cannot be divested of jurisdiction under the UCCJA while the petition was pending.¹⁰⁹ In affirming the trial court, the court of appeals held that "jurisdiction under the UCCJA is established on the date that a party files a petition to modify and that a court may not lose jurisdiction while such a matter is pending."¹¹⁰

C. Modification of Custody

The case of *Rea v. Shroyer*,¹¹¹ dealt with the issue of whether a court is allowed to consider events that occurred after the non-custodial parent filed a petition for custody modification in determining whether a substantial change of circumstances had occurred to allow for the modification of the initial custody award. The child was born out of wedlock and paternity was established in Father. Mother was awarded custody and Father was required to pay support. Approximately three years later, Father filed a petition to modify custody and support, alleging a substantial and continuing change of circumstances justified modifying custody. After a hearing, trial court granted the petition and custody was established in Father. Making its determination, the trial court considered evidence after the petition was filed in support of a finding that a substantial change of circumstances had occurred.¹¹²

On appeal, Mother contended that the trial court committed error when it considered factors that had occurred after Father had filed his petition relying

107. *Id.* at 855.

108. *Id.* at 855-56.

109. *Id.* at 856.

110. *Id.*

111. 797 N.E.2d 1178 (Ind. Ct. App. 2003).

112. *Id.* at 1180-81.

upon the case of *Joe v. Lebow*,¹¹³ for the proposition that evidence must be limited to changes occurring prior to the filing of the petition for modification. Regarding *Joe*, the court stated the following:

In *Joe*, we held that when making a determination regarding modification of custody, evidence of events occurring after the court granted an emergency petition to modify support may be considered *only* when determining what is in the best interests of the child. As for a substantial change in one of the factors in Ind. Code [section] 31-14-13-6, the evidence must demonstrate "changes occurring . . . while in Mother's custody prior to the emergency petition which justified the transfer of custody."¹¹⁴

The court also noted that in a cases decided after *Joe* it had held that the trial court may consider all changes that have occurred since the last custody determination and at the time of the hearing.¹¹⁵ Therefore, the court held that when determining whether a substantial change has occurred in one of the statutory factors, that it was proper to consider any events between the time the original custody was determined and the hearing.¹¹⁶

In Indiana it is well established that, when joint custody has not been awarded, the custodial parent has the right to determine the religious beliefs and training of the child as long as the custodial parent's religious views do not harm the emotional or physical well-being of the child. *Conflenti v. Huff*¹¹⁷ addressed the issue of limitations on a non-custodial parent's exercise of visitation and parenting time because of the custodial parent and child's religious beliefs. The child, who was born out of wedlock, and the custodial parent were Jehovah's Witnesses. As part of their religious beliefs, they do not celebrate birthdays, holidays, or Christmas. The trial court had imposed limitations upon the non-custodial parent's visitation and parenting time so as not to conflict with the child's beliefs. The non-custodial parent was prohibited from celebrating birthdays and holidays, and was not allowed to give gifts. Furthermore, the non-custodial parent was not allowed to have parenting time with the child on Christmas or Christmas Eve. On appeal, the Indiana Court of Appeals affirmed the trial court's determination that these limitations would be in the best interest of the child.¹¹⁸ The court noted that Indiana Code section 31-14-14-1¹¹⁹ allows the court to impose restrictions on parenting time if, after a hearing, the exercise of that parenting time might endanger the child's health or well-being or impair the child's emotional development.¹²⁰ Other Indiana cases had allowed

113. 670 N.E.2d 9 (Ind. Ct. App. 1996).

114. *Rea*, 797 N.E.2d at 1182 (citing *Joe*, 670 N.E.2d at 22-23).

115. *Id.* at 1183.

116. *Id.*

117. 815 N.E.2d 120 (Ind. Ct. App. 2004).

118. *Id.* at 126.

119. IND. CODE § 31-14-14-1 (2004).

120. *Conflenti*, 815 N.E.2d at 124.

restrictions on parenting time to accommodate a child's religion as long as interference with parenting time was not unreasonable and the custodial parent was not using religion to limit the non-custodial parent's visitation.¹²¹ Here, the non-custodial parent was not being denied parenting time but had been ordered to avoid activities that conflicted with the child's religious beliefs.¹²²

III. CHILD SUPPORT

A. College Expenses

Several cases during the survey period dealt with the issue of college expense. In *Naggatz v. Beckwith*,¹²³ Father agreed to pay all of the child's college expenses and uninsured healthcare expenses in lieu of child support. Mother had filed a petition to modify child support and determine education expenses. At the hearing, the parties submitted the stipulation referred to above. The trial court ordered Father to pay \$10,040 a year in college expenses plus \$3,684 in uninsured healthcare expenses. The bone of contention was that the court's order differed from the stipulation that had been submitted to the court.¹²⁴ The court's order respecting college expenses reflected a credit to Father for the amount of the child's Stafford loan. The agreement had called for the child to pay proceeds of the loan over to Father. Mother appealed, arguing that this deviation from the parties' stipulation essentially required the child to pay a portion of her college expenses, when the intent of the parties was to have the child not have to pay any expenses.¹²⁵ Referring to the Indiana Child Support Guideline 6, the Indiana Court of Appeals held that the policy of the Guidelines required post-secondary education be "a group effort."¹²⁶ The Guidelines state that "scholarships, grants, student loans, summer and school year employment . . . should be credited to the child's share of the educational expenses unless the court determines that it should credit a portion of any scholarships, grants, and loans to either or both parents' shares."¹²⁷ Thus, the court held that the trial court committed no error crediting the amount of the loan to the child as her share of the educational expenses, and even though the wishes of the parties are to be given great weight, it is the duty of the trial court to determine if any agreement is in the best interest of the child.¹²⁸

121. See *Periquet-Febres v. Febres*, 659 N.E.2d 602, 606 (Ind. Ct. App. 1995); *Johnson v. Nation*, 615 N.E.2d 141, 145-46 (Ind. Ct. App. 1993); *Overman v. Overman*, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986).

122. *Conflenti*, 815 N.E.2d at 125.

123. 809 N.E.2d 899 (Ind. Ct. App.), *trans. denied* 822 N.E.2d 974 (Ind. Ct. App. 2004).

124. *Id.* at 901-02.

125. *Id.* at 902.

126. *Id.* (quoting IND. CHILD SUPP. G. 6).

127. *Id.* (emphasis omitted) (quoting IND. CHILD SUPP. G. 6).

128. *Id.*

Sebastian v. Sebastian,¹²⁹ was a case of first impression where the Indiana Court of Appeals held that Father was not required to pay a child's college expenses for any semester immediately following a semester where the child did not achieve at least a 2.0 GPA. The parties here were divorced in June 1994 and in September 1997 the trial court ordered the parents to equally share the son's tuition and book expenses provided that the son remain a full-time student, maintain a C-average and furnish Father with grades upon their receipt.¹³⁰ Thereafter, the son attended Ball State and for the 1998-1999 school year failed to earn a C-average. Because of this, he was unable to register for the Fall 1999 semester. The son had to petition the University to allow him to return and he returned to the University, for the Spring 2000 semester. He eventually graduated in 2002.¹³¹ Father did not pay tuition or expenses for the child. Mother sought contribution for these expenses from Father. Ultimately, the trial court entered an order requiring Father to reimburse Mother in excess of \$27,000 for the son's college and living expenses.¹³²

On appeal, Father argued that his son's first poor performance should have been sufficient grounds to emancipate the child fully and relieve Father of his obligation for educational expenses.¹³³ The court noted, however, that to adopt that position would have made it impossible for the son to graduate from college and was too harsh. Instead, it relieved Father of his educational expense obligation only following those semesters in which the son had failed to maintain the proper grade point average. The court remanded to the trial court to determine which semesters Father should be relieved of payment, keeping in mind that Father "should not be required to contribute to any semester following a semester where [son] achieved below a 'C' average."¹³⁴

*Borth v. Borth*¹³⁵ involved a case where the parties attempted to provide for post-secondary education in the dissolution decree, their intent, it seemed, to cap their obligation at the cost of an Indiana state-supported university. While the child was a senior in high school, the child began exploring college alternatives. One of those college alternatives included Baylor University, a private school in Texas. Mother knew that daughter was contemplating attending Baylor University, assisted in the process and even drove the child to Baylor for the start of her first year of college.

In the divorce settlement, the parties agreed as follows:

7. Post-secondary Education: Each of the parties agree that they will

129. 798 N.E.2d 224 (Ind. Ct. App. 2003).

130. *Id.* at 225.

131. *Id.* at 226.

132. *Id.*

133. *Id.* at 234. The court, earlier in the decision, held that the son had turned twenty-one prior to the hearings on Father's petition and was emancipated as a matter of law as of the date he turned twenty-one. *Id.* at 229.

134. *Id.* at 234, 236.

135. 806 N.E.2d 866 (Ind. Ct. App. 2004).

share in the future post-secondary educational expenses incurred by each of the minor children in such sum as would be appropriate for a student attending a state support [sic] Indiana University, unless otherwise agreed, in shares proportionate to their incomes which are 63% for the Petitioner and 37% for the Respondent.¹³⁶

Mother refused to pay thirty-seven percent of the cost of attending Baylor University and instead insisted that her responsibility was limited to thirty-seven percent of the cost of attending Indiana University. In response, Father filed a petition to modify the agreement on post-secondary education. At the hearing, the trial court ordered Mother to pay thirty-seven percent of the cost of the child's freshman year at Baylor and then forty percent of her tuition, room, board, books, fees and automobile, for the remainder of her college education. The trial court found that the parties had modified the property settlement agreement when Mother agreed that the child could attend Baylor. Mother appealed.¹³⁷

On appeal, the court noted that parties can provide for post-secondary education expenses in their settlement agreement, but these provisions are subject to modification by the trial court.¹³⁸ However, the court need not modify such an agreement if the change in circumstances was contemplated at the time the support order was entered.¹³⁹ The parties did not specify in their agreement how expenses in excess of those attributed to a state-supported school should be apportioned so the change in circumstances here was not contemplated in the agreement.¹⁴⁰ Therefore, it was proper for the trial court to address the issue. The fact that the parties had an eighty-nine percent increase in income, along with Mother's knowledge and acquiescence in the child's attending the private university represented a substantial change in circumstance justifying modification of the support order.¹⁴¹ Interestingly, the Indiana Court of Appeals advised trial courts to proceed with caution in modifying agreements where the property settlement provided for in-state college education costs versus out-of-state or private institution costs.¹⁴² It would seem, that when drafting a property settlement that encompasses college costs, if it is the intent of the parties to cap their obligation at the cost of state-supported schools, then care should be taken to exclude other possibilities that may arise.

B. Modification Due to Change in Income

A couple of cases during the survey period dealt with modification of support

136. *Id.* at 868.

137. *Id.* at 868-69.

138. *Id.* at 869.

139. *Id.* at 870.

140. *Id.*

141. *Id.*

142. *Id.* at 871.

due to change in the income of the parties. *Burke v. Burke*,¹⁴³ involved a father who was an assistant college football coach who lost several jobs resulting in a reduction of income each time. Father petitioned for a modification in child support after each job loss. The most recent modification downward of child support was filed less than a year after the previous modification.

Mother's argument on appeal was that (1) the trial court's modification was less than twenty percent of the previous order and it occurred before the one year limitation period imposed by Indiana Code section 31-16-8-1(2), and (2) Father did not present any evidence of changed circumstances to support the modification order. Father responded by contending that a decrease in income by \$10,000 qualified as substantial change in circumstances.¹⁴⁴

Indiana Code section 31-16-8-1 is the basis for modifying child support orders in Indiana and provides in part that child support orders may be modified only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) the party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.¹⁴⁵

Mother argued that there was not a twenty percent difference between the modified order and the previous order. Essentially, the Indiana Court of Appeals determined that Mother was attempting to convince them that in order to modify support, both subsections of the statute need to be satisfied. The court rejected this contention, affirming that either Indiana Code section 31-16-8-1(1) or section 31-16-8-1(2) may be used to seek modification of a child support order.¹⁴⁶ The court did not address the twenty percent issue, but instead focused on the change in circumstances.¹⁴⁷ Father did not change jobs in order to avoid paying child support and he lost his job, not because he performed poorly, but because the head coach was fired and, a fact of life in college football is that when the head coach gets fired, so do the assistant coaches. The record showed that Father was forced to accept a lower paying job in order to remain in his chosen field. As a result of the lowered income, Father's budget revealed that he had very little discretionary income left after paying bills and child support. The court found

143. 809 N.E.2d 896 (Ind. Ct. App. 2004).

144. *Id.* at 898.

145. IND. CODE § 31-16-8-1 (2004).

146. *Burke*, 809 N.E.2d at 898.

147. *Id.*

a substantial change in circumstances.¹⁴⁸

In the case of *MacLafferty v. MacLafferty*,¹⁴⁹ the court found that Father's child support obligation could be modified and reduced due to an increase in Mother's income. It also found that a summer day camp was no longer needed as a child care expense because Father's wife was capable of providing child care at no cost during the summer.¹⁵⁰ However, the Indiana Supreme Court granted transfer and pursuant to Indiana Appellate Rule 58 (A) the opinion of the court is vacated. The Indiana Supreme Court had not issued an opinion as of the date this survey was written.

C. Emancipation/Repudiation of Parent

In the case of *Butrum v. Roman*,¹⁵¹ the court dealt with the issue of when is a child "enrolled" in school for purposes of the emancipation statute. Indiana Code section 31-16-6-6 provides in part:

(a) The duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age unless any of the following conditions occurs:

(1) The child is emancipated before becoming twenty-one (21) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.

(2) The child is incapacitated. In this case the child support continues during the incapacity or until further order of the court.

(3) The child:

(A) is at least eighteen (18) years of age;

(B) has not attended a secondary or post-secondary school for the prior four (4) months, and is not enrolled in a secondary or post secondary school; and

(C) is or is capable of supporting himself or herself through employment.

(b) For purposes of determining if a child is emancipated under subsection (a)(1), if the court finds that the child:

(1) has joined the United States armed services;

(2) has married; or

(3) is not under the care or control of

(A) either parent; or

148. *Id.* at 899.

149. 811 N.E.2d 450 (Ind. Ct. App.), *trans. granted*, 822 N.E.2d 977 (Ind. 2004).

150. *Id.* at 455.

151. 803 N.E.2d 1139 (Ind. Ct. App. 2004).

(B) an individual or agency approved by the court; the court shall find the child emancipated and terminate the child support.¹⁵²

The parties' daughter moved in with her boyfriend after she had graduated from high school. They lived together from May 2002 until January 2003. During this time, the child worked full-time to save money for college. While she was living with her boyfriend, she still received financial support from her parents. Ultimately, she was accepted to Purdue University and moved to West Lafayette in January 2003 where she began living with three other girls and began her classes. She received a scholarship for tuition and books.

Mother petitioned to modify child support and for contribution toward college expenses and Father filed a petition to emancipate the child. Ultimately, the trial court granted Mother's motion and Father appealed.¹⁵³

On appeal, the court noted, citing *Dunson v. Dunson*,¹⁵⁴ that "[e]mancipation cannot be presumed; rather, the party seeking emancipation must establish it by competent evidence."¹⁵⁵ Father argued that his child was emancipated under both (a)(3) and (b)(3) of Indiana Code section 31-16-6-6. Indiana Code section 31-16-6-6(a)(3) states that the duty to pay child support stops if three requirements are met. Those requirements are: (1) The child is at least 18 years old; (2) the child has not been to school for the prior four months and is not enrolled in school; and (3) the child is capable of self-support through employment.¹⁵⁶ All three requirements must be met before a court can find emancipation has occurred.¹⁵⁷

It was Father's contention that the child had not been enrolled in school for the four months proceeding his filing of the petition to emancipate. The trial court had found that the child was enrolled prior to the filing of the petition to emancipate, because she was going through the application process. This meant that the court of appeals had to decide the definition of "enroll." The court noted that enroll is not defined in Title 31 of the Indiana Code.¹⁵⁸ Therefore, it turned to Title 20 of the Indiana Code, which governs education, for some guidance. At Indiana Code section 20-12-71-6, the court found a definition of enrolled to be "the process enabling a student to become a bona fide member of the student body of a post-secondary institution and entitling the student officially to audit or receive academic credit for on-campus instruction in Indiana."¹⁵⁹ The court also turned to *Black's Law Dictionary*, which defines enroll as "to register . . . into an official record on execution."¹⁶⁰ Ultimately, the Indiana Court of Appeals

152. *Id.* at 1143 (quoting IND. CODE § 31-16-6-6).

153. *Id.* at 1142.

154. 769 N.E.2d 1120, 1123 (Ind. 2002).

155. *Butrum*, 803 N.E.2d at 1143.

156. *Id.* at 1144 (citing IND. CODE § 31-16-66(a)(3)).

157. *Id.*

158. *Id.* at 1145.

159. *Id.* (citing IND. CODE § 20-12-71-6).

160. *Id.* (quoting BLACK'S LAW DICTIONARY 551 (7th ed. 1999)).

determined that “[a]fter viewing these definitions of ‘enroll,’ we conclude that ‘is enrolled’ as used in Indiana Code [section] 31-16-6-6 means more than being involved in the application process; rather, it means that one has been accepted to the institution and is officially registered at the institution as a student.”¹⁶¹

The daughter was still in the application process when Father filed his petition; therefore, the Indiana Court of Appeals found that the trial court’s finding was clearly erroneous and that the child was not enrolled.¹⁶² But, the court did not end the inquiry because all three requirements of subsection (a)(3) must be fulfilled before a child can be emancipated.¹⁶³ The court found that she was not self-supporting because when she and her boyfriend were living together they lived rent free, and she still received financial assistance from her parents for groceries and clothing. As such, she was not emancipated under section (a)(3).¹⁶⁴

Father’s other contention was that the child was emancipated under section (b)(3) because she was “not under the care or control of either parent because she was eighteen years old, living with her boyfriend, and working full time.”¹⁶⁵ Relying again upon *Dunson*, the court of appeals found that to qualify for emancipation under this section, the child must (1) initiate the action putting herself out of the parent’s control; and (2) be self-supporting.¹⁶⁶ While it is true that the child put herself out of the parent’s control, it was also true that she was not self-supporting. The court concluded that Father failed to meet his burden under subsection (b)(3).¹⁶⁷

In a unique case, both factually and procedurally, *Borders v. Noel*,¹⁶⁸ involved the application of Indiana Code section 31-16-6-6(b)(1) which provides for emancipation by operation of law when a child joins the military. In this case, the son joined the Marine Corp Reserves upon graduation from high school. Five weeks into basic training, the child suffered a knee injury which resulted in his discharge from the service. Approximately two months after he joined the military, he then moved back into Father’s home, Father having been awarded physical custody of the child. Mother had been ordered to pay child support. Mother then filed her petition for emancipation. At the time of the hearing, he was not enrolled in school. The trial court determined that “as a matter law,” the son was emancipated when he enlisted in the military and that Mother’s support obligation terminated on the date the child enlisted. Father appealed. Father first asserted that it was error for the trial court to find that the son had been emancipated as a matter of law.¹⁶⁹

161. *Butrum*, 803 N.E.2d at 1145.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1146.

166. *Id.*

167. *Id.* at 1147.

168. 800 N.E.2d 586 (Ind. Ct. App. 2003).

169. *Id.* at 588.

The son had joined the reserves in June, but was discharged in August due to his injury. Mother had filed her petition for emancipation after the son had been discharged. Relying on the strict interpretation of Indiana Code section 31-16-6-6(b)(1), the Indiana Court of Appeals held that the son was emancipated when he joined the military in June 2002.¹⁷⁰ However, because Mother did not file her petition until after he had been discharged, the court examined the issue of whether the child support obligation had been revived, noting that previous cases had indicated that a support obligation may be revived under certain circumstances.¹⁷¹ Therefore, the trial court erred when it failed to consider whether the support obligation had been revived.¹⁷²

Mother also argued that the child was emancipated under subsection (a)(3). The court of appeals found that the child was not enrolled in school and he was working a full-time job.¹⁷³ Unlike subsection (b)(1), where the child support terminates on the date of emancipation, subsection (a)(3) provides that child support is terminated on the date that the court finds the child is emancipated.¹⁷⁴ Therefore, under subsection (a)(3) the court remanded with instructions to clarify the date upon which Mother's child support obligation terminated under (a)(3).

*Bales v. Bales*¹⁷⁵ involves a case where the child repudiated Mother and maintained no contact with Mother. The trial court terminated Mother's obligation to pay child support. On appeal, the Indiana Court of Appeals reversed.¹⁷⁶ The court first noted that under Indiana law, the child's complete refusal to participate in a relationship with his or her parent, under certain circumstances, will terminate the parent's obligation to pay certain expenses, including college expenses.¹⁷⁷ The court observed that no case in Indiana had determined that a child's withdrawal from communication with the parent justified termination of a parent's financial responsibility to pay child support. The court refused to take that step here and did not extend it to the payment of child support.¹⁷⁸ The court reasoned that the payment of college expenses and the payment of child support are not legally equivalent in Indiana. There is no absolute duty on the part of the parents to provide a college education for their children. Parents do, however, have a legal obligation to provide their children with support.¹⁷⁹

170. *Id.* at 591.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 592.

175. 801 N.E.2d 196 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

176. *Id.*

177. *Id.* at 199 (citing *McKay v. McKay*, 644 N.E.2d 164, 168 (Ind. Ct. App. 1994)).

178. *Id.*

179. *Id.*

D. Income Issues

What is includable as income for the purposes of child support was addressed in a couple of cases during the survey period.

In *McGill v. McGill*,¹⁸⁰ the trial court ordered Father to pay \$15.57 per week in child support. Father was disabled and his income consisted of two components: Supplemental Security Income ("SSI") of \$296 per month and Social Security Disability Benefits ("SSDI") in the amount of \$276 per month.¹⁸¹ The trial court used the combination of these two benefits when it calculated the child support obligation. The application of the child support guidelines to Father resulted in an order that denied Father the means of self-support at a subsistence level. On appeal, the court discussed SSDI and SSI. SSI is a means-tested public assistance program.¹⁸² SSDI benefits are awarded for disability and are awarded regardless of the recipient's income level.¹⁸³

The Indiana Court of Appeals found that because SSI is a means tested public assistance program, SSI payments are not included in a parent's income for the purposes of computing child support under the Indiana Child Support Guideline 3(A)(1). However, SSDI benefits are included in the definition of weekly gross income.¹⁸⁴ The court of appeals went on to state that including public assistance benefits in the calculation of child support obligations defeats the purpose of the public assistance programs, because these programs are designed to keep the recipient at a minimum subsistence level.¹⁸⁵ The matter was remanded to the trial court to recalculate based solely upon the SSDI benefits. The trial court was further directed to analyze whether the recalculated amount would deprive Father of self-support at a subsistence level.¹⁸⁶

Tebbe v. Tebbe,¹⁸⁷ raised the question of whether pass-through income of an S Corporation that is received by a parent should be included in the calculation of a child support obligation. Here Father was a minority shareholder in a S Corporation. He had non-disbursed pass-through income. Father was employed by the S Corporation and received forty-nine percent of his employer's stock. His annual salary ranged between \$46,000-52,000. His employer was the S Corporation and, as an owner, he was required to include on his personal taxes a percentage of the company's income that was attributable to his ownership interest.¹⁸⁸ Father did not actually receive most of the income. He was paid only an amount sufficient to offset his increased tax obligations. The court noted that "[f]or taxation purposes, regardless of whether the income is actually disbursed,

180. 801 N.E.2d 1249 (Ind. Ct. App. 2004).

181. *Id.* at 1250.

182. *Id.* at 1252.

183. *Id.*

184. *Id.*

185. *Id.* at 1253.

186. *Id.*

187. 815 N.E.2d 180 (Ind. Ct. App. 2004).

188. *Id.* at 182.

S Corporation revenue is imputed directly to its shareholders in accordance with the shareholder's percentage of company ownership."¹⁸⁹

Mother petitioned for divorce and the final hearing was held before a magistrate. At the hearing the magistrate found that Father was capable of earning an additional \$24,582 in pass-through income, over and above Father's annual salary. The magistrate used this amount to establish Father's income for child support purposes. The magistrate submitted a proposed decree of dissolution which was approved by the trial court judge.

Father then filed a motion to correct errors alleging, among other things, that including the pass-through income in his child support obligation was error. The court denied the motion to correct errors.¹⁹⁰ On appeal, the court of appeals noted that this was an apparent case of first impression stating that: "No Indiana case has previously determined whether a minority shareholder pass-through income that was never disbursed to the shareholder should be included in child support calculations. Accordingly, case law from other jurisdictions and the Indiana Child Support Guidelines . . . inform our analysis."¹⁹¹ After review, the court concluded that undistributed pass-through income should not be included in the calculation for child support, unless the S Corporation was being used to shield income.¹⁹² Mother argued that at the very least, the amount paid to Father to compensate him for tax liability, incurred as a result of the pass-through income, should be included in the child support calculation.¹⁹³ However, other jurisdictions' decisions revealed that such limited pass-through incomes are not to be included in income for the purposes of child support calculations.¹⁹⁴

Citing to an earlier Indiana Court of Appeals decision from 2004,¹⁹⁵ the court indicated that it was the policy of the Guidelines that the children should receive the same portion of potential income as he/she would have received had the parents' marriage remained in tact.¹⁹⁶ Prior to the dissolution of the marriage, Father had never been paid the pass-through income (except that income attributed to tax liability) and, therefore, the children still would not be receiving the benefit of the pass-through income had the marriage not been dissolved, which was consistent with the Guidelines.¹⁹⁷ Finally, using the same reasoning, non-inclusion in the child support calculation of pass-through income that only compensates for tax liability was consistent with the Guidelines.¹⁹⁸

The case of *Harris v. Harris*,¹⁹⁹ considered the issue of proceeds from a

189. *Id.* at 182 n.2 (citing 26 U.S.C. § 1366).

190. *Id.* at 182-83.

191. *Id.* at 183.

192. *Id.* at 183-84.

193. *Id.* at 183.

194. *Id.*

195. *McGill v. McGill*, 801 N.E.2d 1249, 1250-51 (Ind. Ct. App. 2004).

196. *Tebbe*, 815 N.E.2d at 183-84.

197. *Id.* at 184.

198. *Id.*

199. 800 N.E.2d 930 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 798 (Ind. 2004).

wrongful termination settlement. Father filed a petition to modify child support based upon a substantial and continuous change in circumstances alleging a change in employment and the financial situation of both the parties. More specifically, Mother, post-dissolution, had obtained regular employment at a substantial salary, working out of her home. Father lost his employment, instituted a wrongful termination lawsuit, and then moved to Colorado and found, what the trial court determined to be “a lucrative job.”²⁰⁰ The issue of note, however, is the fact that the trial court only included in the calculation for child support the net amount of proceeds from the wrongful termination lawsuit that was actually received by Father. Mother argued that the gross amount should have been included for child support purposes. The monies actually available to Father, as a result of the wrongful termination lawsuit, were approximately \$189,500 after taxes, attorney’s fees, and what the court termed a “portion of the settlement award [that went] towards finding and acquiring new employment.”²⁰¹

In affirming the trial court’s decision, the Indiana Court of Appeals determined that the settlement award was a one-time payment of money and that the gross amount of the settlement award was “an irregular and non-guaranteed form of income, which the trial court, in its discretion, could exclude from its determination of gross income.”²⁰² Indiana Child Support Guideline 3(B), Comment 2, requires that these types of irregular income be approached with caution, in including them in the total income approach. “[W]hile irregular income is includable in the total income approach taken by the Guidelines, the determination is very fact sensitive.”²⁰³ As such, because the net portion actually available to Father would have been the only amount available to the family, the trial court was correct in including only that amount.²⁰⁴

E. Provisional Orders

The supreme court granted transfer in the case of *Bojrab v. Bojrab*.²⁰⁵ One of the issues decided by the Indiana Supreme Court on transfer was whether a party could raise claimed errors in a trial court’s interlocutory support orders on appeal from a final divorce judgment.²⁰⁶ During the hearing on the provisional orders, Husband testified that there was a possibility he would be leaving his current employment. In its supplemental provisional order, the trial court indicated that it would allow Husband to present additional testimony and evidence on the issue of alleged change of financial circumstances at the trial of the case. In this order, the trial court left open the possibility of modifying the

200. *Id.* at 933.

201. *Id.* at 940.

202. *Id.* (citing *Gardner v. Artemia*, 743 N.E.2d 353, 359 (Ind. Ct. App. 2001)).

203. *Id.* (citing IND. CHILD SUPP. G. 3(A), cmt. 2(b)).

204. *Id.*

205. 810 N.E.2d 1008 (Ind. 2004). The Indiana Court of Appeals decision is reported at *Bojrab v. Bojrab*, 786 N.E.2d 713 (Ind. Ct. App. 2003).

206. *Bojrab*, 810 N.E.2d at 1014.

maintenance and support order. Husband contended that the court's language made this a modifiable order subject to retroactive revision. On appeal, Husband argued the trial court committed error when it did not retroactively modify its order for provisional maintenance and child support.²⁰⁷ The Indiana Court of Appeals found that an order of temporary support and maintenance is an order for the payment of monies and that Indiana Appellate Rule 14(A) provides that interlocutory orders for the payment of money may be appealed, as a matter of right, by filing a notice of appeal.²⁰⁸

The Indiana Supreme Court noted, however, that

Shortly after the Court of Appeals issued its decision, we decided *Georgos v. Jackson*, 790 N.E.2d 448 (Ind. 2003), which held that, even though an interlocutory order may be appealable as of right under Appellate Rule 14(A)(2), there is no requirement that an interlocutory appeal be taken. A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal, but may be raised on appeal from the final judgment.²⁰⁹

As to the merits of Husband's argument, the trial court found Husband could have remained at his prior position, and that he voluntarily changed jobs.²¹⁰ Despite this, the court held that he was in a financial position to finance the support and maintenance during the transition "thus maintain[ing] the standard of living for his wife and children."²¹¹ Therefore, the supreme court found that it was not an abuse of discretion to deny retroactive modification.²¹²

F. Support of a Non-Biological Child

In *Tirey v. Tirey*,²¹³ the Indiana Court of Appeals addressed the issue of whether a man who volunteered to pay child support for a non-biological child in exchange for visitation pursuant to a dissolution of marriage can later seek to relieve himself of that obligation.

During the marriage, Wife's niece came to live with Husband and Wife when the niece was only a few days old. No guardianship or formal legal custody was ever established though Husband and Wife did have an agreement from the biological mother giving them full permanent custody. Husband and Wife, who also had a biological child, were later divorced and in the decree of dissolution Husband agreed to pay child support for the niece in exchange for visitation rights and maintaining what he considered to be a parent-child relationship. After paying support for several years, Husband's circumstances changed and he

207. *Id.*

208. *Id.*

209. *Id.* (citing *Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003)).

210. *Id.* at 1015.

211. *Id.*

212. *Id.*

213. 806 N.E.2d 360 (Ind. Ct. App. 2004).

saw fit to modify support which included eliminating all of his obligation of support for the niece. Relying upon *Fairrow v. Fairrow*,²¹⁴ Husband argued that it was against public policy for him, as the non-biological father, to be ordered to pay child support for the child of another man.²¹⁵ The trial court refused to set aside the order to pay support and Husband appealed. Affirming the trial court, the Indiana Court of Appeals noted that while *Fairrow* stands for the proposition that public policy does not favor a support order against a man not the biological father of a child, it does not apply to a case where the man knowingly agreed to pay child support for a non-biological child in exchange for adequate and valuable consideration.²¹⁶ While the parties to a dissolution of marriage are free to enter into agreements for the payments of child support which are limited only by the best interest of the child, the court found that, in cases involving an agreement for the gratuitous payment of child support (which could not have been otherwise ordered by the court), the law of contracts also must be considered.²¹⁷ Here the court found that the agreement to pay child support was voluntarily entered into and was supported by adequate consideration. Thus, the court held in a dissolution proceeding a court has full authority to enter a child support order against the non-parent party so long as that order is the product of voluntary agreement supported by valid consideration and entered into without fraud, duress, or mistake.²¹⁸

IV. PATERNITY

In the case of *Reynolds v. Dewees*,²¹⁹ the court decided a matter of first impression involving the interplay between the placement of a child in a pending CHINS case and a simultaneous petition for change of custody in the paternity action. Father had established paternity and, by agreement of the parties, Mother was awarded custody of the child. Subsequently, a CHINS action was filed and the child was removed from Mother's home by the CHINS court and temporarily placed with Father. While the CHINS case was still pending Father filed a petition for change of custody in the paternity court. The paternity court awarded Father permanent custody and Mother appealed alleging that the paternity court lacked jurisdiction to change custody while the CHINS proceeding was pending. The Indiana Court of Appeals observed that Mother's argument was once a correct statement of the law.²²⁰ The court noted, however, that on July 1, 1999, Indiana Code section 31-30-1-13 took effect.²²¹ The court of appeals held that

214. 559 N.E.2d 597, 600 (Ind. 1990).

215. *Tirey*, 806 N.E.2d at 363.

216. *Id.* at 364.

217. *Id.*

218. *Id.* at 365.

219. 797 N.E.2d 798 (Ind. Ct. App. 2003).

220. *Id.* at 800.

221. Indiana Code section 31-30-1-13 states:

(a) Subject to (b) a court having jurisdiction under IC 31-14 of a child custody

Indiana Code section 31-30-1-13 gives a paternity court concurrent original jurisdiction with a juvenile court to modify child custody even when there is a pending CHINS proceeding.²²² The court noted, however, that the authority of a paternity court to modify custody of a child during a pending CHINS action does have limitations.²²³ Specifically, when the paternity court modifies custody under Indiana Code section 31-30-1-13(a) the modification will become effective only when a CHINS court enters an order approving the child custody modification.²²⁴ That piece of information was not apparent to the Indiana Court of Appeals in *Reynolds*, and the court thus limited its holding to state that Indiana Code section 31-30-1-13 vested the paternity court with the requisite jurisdiction to enter the order that it did.²²⁵

The case of *Richard v. Richard*,²²⁶ was a paternity matter that involved identical twins. Husband, one of the identical twins, and Wife were divorced in September 2000. In June 2001, Wife gave birth to the child. Wife filed a petition to establish paternity in her former Husband. The former Husband filed a third party complaint seeking to establish paternity in his identical twin brother. DNA testing was conducted and the former-Husband's probability of paternity was determined to be 99.999% and his twin's was determined to be 99.995%.

During the hearing the twin, who had cognitive difficulties, testified—rather crudely—that he had sexual intercourse a number of times with Wife during the period of conception. During his testimony, the twin offered to pay \$25 per week in support, implying that he was the father of the child. The former Husband testified that he did not have sex with Wife during the conception period. The trial court found that there was a presumption of paternity in Husband and that Husband could not rebut that presumption.²²⁷ Husband appealed, challenging the

proceeding in a paternity proceeding has concurrent original jurisdiction with another juvenile court for the purpose of modifying custody of a child who is under the jurisdiction of the other juvenile court because:

- (1) the child is the subject of a child in need of services proceeding; or
 - (2) the child is the subject of a juvenile delinquency proceeding that does not involve an act described under IC 31-37-1-2.
- (b) Whenever the court having child custody jurisdiction under IC 31-14 in a paternity proceeding modifies child custody as provided by this section, the modification is effective only when the juvenile court with jurisdiction over the child in need of services proceeding or juvenile delinquency proceeding:
- (1) enters an order approving the child custody modification; or
 - (2) terminates the child in need of services proceeding or the juvenile delinquency proceeding.

IND. CODE § 31-30-1-13 (2004).

222. *Reynolds*, 797 N.E.2d at 801.

223. *Id.* at 802.

224. *Id.*

225. *Id.*

226. 812 N.E.2d 222 (Ind. Ct. App. 2004).

227. *Id.* at 224.

conclusion that he did not successfully rebut the statutory presumption of paternity. The Indiana Court of Appeals affirmed.²²⁸ The court of appeals pointed out that Indiana Code section 31-14-7-1 created a presumption of paternity in Husband that was necessary for Husband to rebut.²²⁹ To rebut this presumption, it is necessary to show by:

direct, clear and convincing evidence that the husband: (1) is impotent; (2) was absent so as to have no access to the mother; (3) was absent during the entire time the child must have been conceived; (4) was present with the mother only in circumstances which clearly prove there was no sexual intercourse; (5) was sterile during the time the child must have been conceived; or (6) can show that the DNA test of another man indicates a 99% probability that the man is the child's father combined with uncontradicted evidence that the man had sexual intercourse with the mother at the time the child must have been conceived.²³⁰

While Husband denied having sexual intercourse with Wife, except for the DNA test of the twin, he presented no evidence of the type necessary to rebut the presumption.²³¹ Because this case involved an identical twin and because both men had a ninety-nine percent probability of paternity, Husband contended that the testing and the offer by his twin to pay \$25 per week child support was enough to rebut that presumption.²³² The court of appeals disagreed, reasoning that the Indiana Supreme Court had determined in *LFR v. RAR*,²³³ that mere denial of sexual intercourse with Wife is not sufficient to rebut the presumption of paternity.²³⁴ Following that reasoning, the court of appeals said that the mere testimony by the identical twin that he had sex with Wife was not sufficient to rebut the presumption of paternity.²³⁵

228. *Id.*

229. *Id.* Indiana Code section 31-14-7-1 provides in part that:

A man is presumed to be a child's biological father if:

(1) the

(A) man and child's biological mother are or have been married to each other;
and

(B) the child was born during the marriage or not later than three hundred
(300) days after the marriage is terminated by death, annulment, or
dissolution;

(2) . . . ; or

(3) the man undergoes a genetic test that indicates that at least a ninety-nine percent
(99%) probability that the man is the child's biological father.

230. *Richard*, 812 N.E.2d at 226 (citing *Minton v. Weaver*, 697 N.E.2d 1259, 1260 (Ind. Ct. App. 1998)).

231. *Id.*

232. *Id.*

233. 378 N.E.2d 855, 857 (Ind. 1978).

234. *Richard*, 812 N.E.2d at 226.

235. *Id.* at 228.

V. ADOPTION

One significant case during this survey period deals with a same sex partner being permitted to adopt the biological children of her domestic partner. The case of *In re Adoption of Infant K.S.P. and Infant J.P.*²³⁶ was the first case to recognize the right of a domestic partner, not related biologically or through marriage, to adopt her partner's biological children. Mother and Father had two biological children, one born in 1990 and the other in 1993. Mother and Father were divorced in 1994 and Mother retained the legal custody of the children. Father did not pay child support because of his inability to hold a job due to frequent incarcerations in jail and chronic alcoholism.²³⁷

Mother's same-sex partner sought to adopt the children and filed a petition to adopt, which included written consents from both Mother and Father. The County Office of Family and Children Services ("OFC") filed an Adoptive Family Preparation Summary with the trial court endorsing the partner's adoption of the children. The OFC report determined that Mother and her partner, along with the children, formed a family unit that had been together for seven years. The partner provided support and day-to-day care of the children and fostered a nurturing environment. An adoption would benefit the children because they could be insured through the partner's health insurance and, if anything happened to Mother, the children would not be without a parent. The trial court denied the partner's petition because she was not married to the biological mother or the biological father. The trial court reasoned that allowing the partner to adopt would divest the biological mother of her parental rights, in accordance with Indiana Code sections 31-19-15-1 and 31-19-15-2.²³⁸ The trial court found that Indiana Code section 31-19-15-1 divests biological parents, if they are alive, of all rights in the child after an adoption. Indiana Code section 31-19-15-2 is the Step-parent Adoption statute. This statute protects the right of the biological parent, only if they are married to the adopting petitioner.

On appeal, the Indiana Court of Appeals noted that they recently decided *In re Adoption of M.M.G.C.*,²³⁹ which dealt with the narrow issue of whether a same-sex domestic partner could adopt the adopted children of her domestic partner, without divesting the adoptive mother of her parental rights. In a holding that was "expressly" limited to the facts of that case, the court held that Indiana law does not require that the rights of the adoptive parents be divested in the adopted child, in the event of a second parent adoption.²⁴⁰ The issue before the *K.S.P.* court was the effect of adoption upon biological parents.

As the court noted, Indiana Code section 31-19-15-1 provides that:

Except as provided in section 2 of this chapter or IC 31-19-16, if the

236. 804 N.E.2d 1253 (Ind. Ct. App. 2004).

237. *Id.* at 1253-55.

238. *Id.*

239. 785 N.E.2d 267 (Ind. Ct. App. 2003).

240. *Id.* at 270 n.1.

biological parents of an adopted person are alive, the biological parents are:

- (1) relieved of all legal duties and obligations to the adopted child; and
- (2) divested of all rights with respect to the child; after the adoption.²⁴¹

Thus, the “strict literal reading of these two statutes would seem to support the trial court’s determination.”²⁴² Such a result in this case would not only be harsh and illogical, it would be destructive of the caring family unit that Mother and partner had built—certainly not a consequence contemplated by the parties. After analyzing the intent and spirit of the Indiana adoption laws, the court concluded such “a destructive and absurd result” could not have been contemplated by the legislature.²⁴³ In reversing the trial court, the court of appeals stated:

We conclude that where, as here, the prospective adoptive parent and the biological parent are both in fact acting as parents, Indiana law does not require a destructive choice between the two parents. Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interest of the child, is the only rational result.²⁴⁴

Another significant adoption case, *In re Adoption of Infant Child Baxter*,²⁴⁵ concerned whether an improperly executed adoption consent may still be valid. In *Baxter*, the adoptive parents met with the natural parents and obtained a consent to adopt. The signatures were by the adoptive parents prior to the child’s birth and there was no one present authorized to notarize the consents as required by Indiana Code section 31-19-9-2.²⁴⁶ The adoptive father then took the consents to have them notarized. It was uncontested that the biological parents were not present when the consents were notarized. Later, after the birth, the biological

241. IND. CODE § 31-19-15-1 (2004).

242. *In re Adoption of Infant K.S.P. and J.P.*, 804 N.E.2d at 1257.

243. *Id.*

244. *Id.* at 1260 (citations omitted).

245. 799 N.E.2d 1057 (Ind. 2003).

246. *Id.* at 1060. Indiana Code section 31-19-9-2 provides that:

The consent to adoption may be executed at any time after the birth of the child either in the presence of:

- (1) the court;
- (2) a notary public or other person authorized to take acknowledgments; or
- (3) an authorized agent of:
 - (A) the division of family and children;
 - (B) the county office of family and children; or
 - (C) a licensed child placing agency.

parents had a change of heart and sought to revoke the consents. The trial court held the consents were invalid and void because they had not been signed in the presence of any of the entities listed in the statute.²⁴⁷ The court of appeals upheld the trial court and transfer was granted by the Indiana Supreme Court.²⁴⁸ In reversing and remanding to the trial court, the supreme court noted that the court of appeals, a decade earlier, ruled in a case where a pre-birth consent was executed that the validity of the consent may nonetheless be satisfied by the evidence that the signatures are authentic and genuine in all respects and that a manifest present intention to give the child up for adoption is present.²⁴⁹ Relying upon that case, the supreme court reasoned that the same result would be true if the consents were not executed in front of one of the specified entities.²⁵⁰ Given the fact that the record contained sufficient evidence of a post-birth act, which sufficiently manifested the present intention to give the child up for adoption, the court remanded to the trial court for consideration of this evidence to determine whether the consents are authentic and valid.²⁵¹

In re T.J.F.,²⁵² dealt with the issue of post-adoption sibling visitation. In *T.J.F.*, a post-adoption visitation agreement was filed in the cause prior to the entry of the decree of adoption. This agreement allowed the child to visit with her biological sister. Subsequently, the trial court entered a decree of adoption but did not include an order approving the post-adoption visitation agreement. Thereafter, the guardian of the biological sister sought to begin visitation. The adoptive parents declined. The office of family and children and the Guardian Ad Litem then filed a motion to permit the visitation. The adoptive parents filed a motion to dismiss which was denied. At trial, the court held that the visitation agreement was valid and the adoptive parents appealed.

Indiana Code section 31-19-16.5-1 states that at the time the adoption decree is entered, the court may order post-adoption contact with a sibling for a child who is at least two years of age.²⁵³ On appeal, the court stated that authorization for post-adoption visitation must be contained in the decree of adoption.²⁵⁴ Absent a specific statement authorizing such visitation, "the judicial authorization for sibling contact ended with the entry of the adoption decree."²⁵⁵ The court remanded to the trial court with instructions to grant the motion to dismiss.²⁵⁶

247. *In re Adoption of Infant Child Baxter*, 799 N.E.2d at 1059-60.

248. *Id.* at 1060.

249. 799 N.E.2d at 1062 (citing *In re Adoption of H.M.G.*, 606 N.E.2d 874 (Ind. Ct. App. 1993)).

250. *Id.*

251. *Id.* at 1062-63.

252. 798 N.E.2d 867 (Ind. Ct. App. 2003).

253. *Id.* at 872 (citing IND. CODE § 31-19-16.5-1).

254. *Id.*

255. *Id.* at 873.

256. *Id.* at 874.

Two cases, *McElvain v. Hite*,²⁵⁷ and *In re Adoption of M.A.S.*,²⁵⁸ seemed to reach different results in determining the burden of proof to be applied in a step-parent adoption. In *McElvain*, Father appealed the trial court's granting of Step-father's petition to adopt the children and terminate the parental rights of Father. In reversing the trial court, the Indiana Court of Appeals stated that Step-father had failed to carry his burden of proof for the granting of his adoption petition without the parental consent of the biological Father.²⁵⁹ Citing to the case of *In re Adoption of Augustyniak*,²⁶⁰ and *In re Adoption of Childers*,²⁶¹ the court held that the burden of proving the statutory criteria for dispensing with such consent is by "clear, cogent, and indubitable evidence."²⁶² In *In re Adoption of M.A.S.*, decided approximately ten months later, a different panel of the Indiana Court of Appeals addressed the issue of the step-father's burden of proof to show that a biological father's consent was not required for the adoption. This time, the trial court's termination of parental rights and granting of the petition of adoption was affirmed.²⁶³ On appeal, Father argued that the standard of evidence dispensing with consent as found in Indiana Code section 31-19-9-8(a)(2) was by "clear, cogent, and indubitable evidence."²⁶⁴ The court noted that the standard of "clear, cogent, and indubitable evidence," dates to the court of appeals decision in *In re Bryant*.²⁶⁵ The court observed that this standard of proof had been followed in subsequent cases. "Indubitable" was defined in *Augustyniak*, as "not open to question or doubt: too evident to be doubted: UNQUESTIONABLE."²⁶⁶ Step-father argued that the "clear, cogent and indubitable" evidence standard was an even more stringent burden of proof than the "beyond a reasonable doubt" used in criminal cases. The court of appeals agreed.²⁶⁷ The court noted that the legislature in 2003 added subsection 11 to Indiana Code section 31-19-9-8(a). Indiana Code section 31-19-9-8(a)(11) provides that the consent of the biological parent may be dispensed with if: "a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent."²⁶⁸ Thus, a petitioner for adoption had to prove by "clear, cogent and indubitable evidence" that a parent had knowingly failed to provide for support or to communicate with the child but only had to prove by clear and convincing evidence that the parent was unfit. The court reasoned that the legislature could not have intended such a

257. 800 N.E.2d 947 (Ind. Ct. App. 2003).

258. 815 N.E.2d 216 (Ind. Ct. App. 2004).

259. *McElvain*, 800 N.E.2d at 949.

260. 505 N.E.2d 868, 870 (Ind. Ct. App. 1987).

261. 441 N.E.2d, 976, 978 (Ind. Ct. App. 1982).

262. *McElvain*, 800 N.E.2d at 949.

263. *In re Adoption of M.A.S.*, 815 N.E.2d at 218.

264. *Id.* at 219.

265. 189 N.E.2d 593, 600 (Ind. App. 1963).

266. *In re Adoption of M.A.S.*, 815 N.E.2d at 219 (quoting *In re Augustyniak*, 505 N.E.2d at 870).

267. *Id.*

268. *Id.* at 220 (emphasis omitted) (quoting IND. CODE § 31-19-9-8(a)(11)).

conflicting result.²⁶⁹ The court also noted that “clear and convincing evidence” is the standard of proof in Indiana Code section 31-37-14-2 which governs proceedings to terminate parental rights.²⁷⁰ Furthermore, the Indiana Supreme Court in the case of *In re Guardianship of P.H.*,²⁷¹ found that before placing a child in the custody of a person other than a natural parent, placement must be in the best interest of the child as determined by clear and convincing evidence.

In another step-parent adoption case, *Mathews v. Hansen*,²⁷² the Indiana Court of Appeals addressed a putative father’s failure to register in the putative father registry. Indiana Code section 31-14-20-2 provides that a putative father who fails to register with the putative father registry will waive his right to the notice of the adoption of the child if the adoption is filed before the putative father establishes his paternity and the child’s mother does not disclose to the attorney or agency arranging the adoption the name or address of the putative father.²⁷³ In this case, Mother had initiated a paternity action several years prior to the petition for adoption, however paternity was never established. At the adoption proceeding the putative Father was served by publication and the trial court granted the adoption. Almost one year later, the putative Father attempted to register with the Indiana putative father’s registry. Thereafter, he filed an Indiana Trial Rule 60(B)(6) motion to vacate the judgment granting the adoption. Step-father moved to dismiss on the grounds that the putative Father’s motion was time barred under Indiana Code sections 31-19-14-2 and 4. Those sections require that actions to challenge an adoption decree must be filed the later of six months after the entry of the adoption decree or one year after the adoptive parents have taken custody of the child. If not brought within that time period, the adoption decree may not be challenged even if notice was not given to the putative father or the adoption proceedings were otherwise defective.²⁷⁴ The court of appeals agreed with Step-father.²⁷⁵ The record in the present case clearly demonstrated that the Indiana Trial Rule 60(B)(6) motion was not brought within six months of the date of the adoption decree or within one year from the time the adoptive parent received custody of the child. As such, the putative Father had been time barred and his due process rights were not violated.²⁷⁶ Furthermore, the court found that he was not deprived of his opportunity to be heard because he had failed to register with the putative father registry and he had waived his right to notice of the adoption.²⁷⁷

The issue of Indiana’s jurisdiction in an adoption with an interstate

269. *Id.*

270. *Id.* (citing IND. CODE § 31-37-14-2 (1998)).

271. 770 N.E.2d 283, 287 (Ind. 2002).

272. 797 N.E.2d 1168 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 795 (Ind. 2004).

273. *Id.* at 1169.

274. *Id.* at 1171 (citing IND. CODE §§ 31-19-14-2, -4 (2003)).

275. *Id.* at 1173.

276. *Id.* at 1172.

277. *Id.* at 1173.

dimension was considered in the case of *In re M.L.L.*²⁷⁸ Mother, who lived in Tennessee, gave the child to her cousin and his wife who brought the child to live with them in Indiana. Mother signed a consent to guardianship and a consent to adoption. At the time of the transfer of the child, there was a paternity petition pending in Tennessee. After the Indiana couple filed their petition for adoption, Mother moved to withdraw her previously executed consents. Mother also obtained an order in the Tennessee court for the return of the child. The child was not returned and the Indiana couple proceeded with adoption, which was granted. On appeal, Mother challenged the Indiana court's jurisdiction to grant the adoption under the UCCJA.²⁷⁹

In affirming the trial court's granting of the adoption, the court of appeals determined that Mother had abandoned the child to the Indiana couple.²⁸⁰ Indiana Code section 31-17-3-3(3) provides that Indiana can exercise jurisdiction under the UCCJA if "the child is physically present in this state and has been abandoned."²⁸¹ While Indiana has no statutory definition of abandonment, case law has defined it as: "when there is such conduct on the part of the parent which evidences a settled purpose to forego all . . . claims to the child."²⁸² The court found that sufficient evidence of this "settled purpose" existed. Mother had given the child to the Indiana couple because her situation as a confidential drug informant for the police endangered the health and safety of the child. In addition to signing the consents referred to above, Mother also gave the Indiana couple the child's belongings, birth certificate, and social security card.²⁸³

Mother also argued that Indiana Code section 31-17-3-6(a), which prohibits the exercise of jurisdiction when another case involving custody is pending in another state, prohibited an Indiana court from exercising jurisdiction. The Indiana Court of Appeals disagreed, noting that the order in the Tennessee paternity case specifically stated that it did not address visitation or custody.²⁸⁴ Thus, the trial court's exercise of jurisdiction was not prohibited.

278. 810 N.E.2d 1088 (Ind. Ct. App. 2004).

279. *Id.* at 1091.

280. *Id.* at 1097.

281. *Id.* (citing IND. CODE § 31-17-3-3(3) (2004)).

282. *Id.* at 1092 (quoting *In re Adoption of Force*, 131 N.E.2d 157, 159 (Ind. App. 1956)).

283. *Id.* at 1092-93.

284. *Id.* at 1093.

SURVEY OF RECENT DEVELOPMENTS IN HEALTH CARE LAW

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Health care in Indiana, as in the rest of the United States, is governed by an evolving and changing body of law, both state and federal, covering a vast number of topics. The 2004 survey article discusses disciplines ranging from Privacy and Security, Labor and Employment, and Fraud, demonstrating the complexities of the practice of health law today.

I. GENERAL HEALTH LAW

There have been several interesting cases impacting health law providers decided in 2004 by the Indiana Court of Appeals. These cases dealt with (a) what constitutes an “occurrence” under Indiana’s Medical Malpractice Statute; (b) whether an arbitration provision contained in a nursing home admission contract was valid and enforceable; and (c) what is required to show a person is suffering from a “grave disability” which would allow the courts to have a person involuntarily committed to a mental health facility.

A. Medical Assurance of Indiana v. McCarty

The Indiana Court of Appeals dealt with the issue of what constitutes an “occurrence of malpractice.” The issue before the court was whether Medical Assurance of Indiana (“MAI”), an insurance company, would be required to pay the statutory maximum for each of two acts of malpractice committed by Dr. Patel during one surgery.¹ Mary Barker had been diagnosed with a malignancy in her colon and had been referred to Dr. Patel for surgery. After the surgery it was found that Barker’s colon was leaking into her abdominal cavity. Dr. Patel performed a second surgery.² Barker continued to experience problems. Two surgeons performed a third operation on Barker to remove the hemoclip left on her ureter and to reverse the colonostomy.³

Barker filed suit for medical malpractice against Dr. Patel.⁴ At trial, Barker was successful in convincing a jury that Dr. Patel breached the standard of care in two ways.⁵ First, he breached the standard of care by suturing the colon in

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1. *Med. Assurance of Ind. v. McCarty*, 808 N.E.2d 737, 739 (Ind. Ct. App. 2004).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

such a way that it leaked, and second by leaving a hemoclip on her ureter.⁶ Barker was awarded \$1.8 million, however, that amount was reduced by the trial court to the amount of \$1.5 million, in order to comply with the statutory maximum proscribed by the Indiana Medical Malpractice Act ("Act").⁷ The Act allows for \$750,000 per act of malpractice.⁸ In the first appeal the court of appeals upheld the trial court's finding that Barker was entitled to recover for each "act" of malpractice committed by Dr. Patel.⁹

After the Indiana Supreme Court denied transfer from the initial appeal in this case, MAI filed a declaratory judgment action against the Indiana Patient's Compensation Fund.¹⁰ MAI asserted that although the court of appeals had determined that Barker was entitled to two maximum \$750,000 recoveries, the Act only required MAI to pay the health care provider \$100,000, the malpractice liability maximum in effect at the time of the surgery, rather than \$200,000.¹¹ The trial court disagreed and required MAI to pay two payments of \$100,000.¹² MAI and Dr. Patel appealed.¹³ On appeal MAI asked the court of appeals to shift the entire cost of the second act of malpractice committed by Dr. Patel to the Fund by only making MAI pay one \$100,000 payment.¹⁴ MAI further argued that the surgery Dr. Patel performed was a single "occurrence of malpractice," regardless of the number of injuries inflicted and negligent acts committed during the surgery.¹⁵

The Indiana Court of Appeals began its review of this case by analyzing the language contained in Indiana Code section 34-18-14-3, which is a portion of the Medical Malpractice Act for the State of Indiana.¹⁶ The court of appeals noted that it had just recently reviewed the Act in the case of *McCarty v. Sanders*¹⁷ and found that the Act was unambiguous.¹⁸ However, when reviewing this case, the court of appeals noted that there was an ambiguity in the statute concerning the use of the word "act" used in paragraph (a) of section 34-18-14-3 and the word "occurrence" contained in (b) of 34-18-14-3.¹⁹ The court of appeals noted that paragraph (a) of section 34-18-14-3 discusses the total amount a patient may recover from all sources for an injury or death and refers to the amount recoverable for "an act of malpractice."²⁰ Paragraph (b) of section 34-18-14-3,

6. *Id.*

7. *Id.*

8. *Id.* at 740.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 742.

15. *Id.*

16. *Id.*

17. 805 N.E.2d 894, 898 (Ind. Ct. App. 2004).

18. *Med. Assurance*, 808 N.E.2d at 742.

19. *Id.*

20. *Id.*

however, refers to the total amount for which a health care provider may be liable and refers to “an occurrence of malpractice.”²¹ In examining the use of the two different words, “act” versus “occurrence,” the court of appeals concluded that the legislature never would have intended that a health care provider/insurer would be allowed to shift its costs to the Fund.²² After examining fundamental tort law principles relating to injuries and the proximate cause of those injuries, the court of appeals concluded that the phrase “an occurrence of malpractice” to be the functional equivalent of “an act of malpractice” for purposes of determining a health care provider’s maximum liability.²³ Further, the court noted that this interpretation was consistent with the case law addressing Indiana Code section 34-18-14-3.1.²⁴

The court then reviewed several key decisions made by the court of appeals and the Indiana Supreme Court concerning the interpretation of Indiana Code section 34-18-14-3.²⁵ The court reviewed the Indiana Supreme Court’s decision in *Miller ex rel Miller v. Memorial Hospital of South Bend*.²⁶ The court also reviewed the decisions in *St. Anthony Medical Center v. Smith*,²⁷ *Bova v. Roig*,²⁸ and *McCarty v. Sanders*.²⁹

The court summarized these decisions concerning the interpretation of Indiana Code section 34-18-14-3 as follows:

Smith, Bova, Miller, Patel, and McCarty have established the following:

(1) a patient who suffers only one compensable injury, regardless of the number of negligent acts causing that injury, is entitled to only one maximum statutory recovery; (2) a doctor who commits more than one negligent act in treating a patient is only liable for one maximum statutory payment if only one compensable injury results; (3) a patient who suffers two or more distinct injuries from two or more negligent acts by one or more health care providers is entitled to the maximum statutory recovery for each injury; and (4) a doctor who commits only one act of malpractice, yet causes more than one compensable injury to more than one patient, is still only liable for one maximum statutory payment.³⁰

The court noted that “the most logical extension of these holdings is that a doctor who commits two or more negligent acts in treating a patient and thereby causes two or more distinct injuries is liable for the maximum statutory payment

21. *Id.* at 743.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 744.

26. 679 N.E.2d 1329 (Ind. 1997).

27. 592 N.E.2d 732, 739 (Ind. Ct. App. 1992).

28. 604 N.E.2d 1, 3 (Ind. Ct. App. 1992).

29. 805 N.E.2d 894 (Ind. Ct. App. 2004).

30. *Med. Assurance*, 808 N.E.2d at 744.

for each compensable injury.”³¹ Each distinct act of malpractice resulting in a distinct injury is “an occurrence of malpractice” under section 34-18-14-3(b) for which a health care provider is liable up to the maximum amount.³² The court of appeals concluded that:

We can conceive of no reason in this case to divorce subsection (a), governing the total amount an injured patient may recover, from subsections (b) and (c), which divvies up how and by whom that recovery will be paid for—i.e., the first \$100,000 (now \$250,000) by the health care provider/insurer, and the remainder by the Fund. When a patient suffers a compensable injury due to malpractice, the patient and the Fund reasonably should expect the health care provider to pay his or her statutory share for each separate injury caused by separate acts of malpractice, regardless of the temporal proximity of those acts.³³

The court of appeals then gave what it considered as the definition of “occurrence”:

“[A]n occurrence of malpractice” under section 34-18-14-3(b) is the negligent act itself plus the resulting injury, with a health care provider’s liability limited to the lowest common denominator between act and injury. That is, if there is only one act but two injuries, there can only be one “occurrence” and health care provider payment; if there are two acts but only one injury, there can only be one “occurrence” and health care provider payment; if there are two distinct acts and two distinct injuries, there can be two “occurrences” and health care provider payments.³⁴

The court of appeals affirmed the trial court’s decision in this case and MAI was required to pay two \$100,000 payments on behalf of its insured Dr. Patel.

B. Sanford v. Castleton Health Care Center, LLC

A case of first impression in the State of Indiana dealt with the enforcement of an arbitration clause contained in an admission agreement to a nursing home. In this case the admission agreement was entered into by the nursing home and the patient’s daughter who had signed as legal representative on her mother’s behalf.³⁵ After several days at the nursing home the patient fell, sustained a fractured hip and subsequently died. The patient’s daughter, Stanford, became the personal representative for her mother’s estate, which filed an action for wrongful death and survival.³⁶ In response, the nursing home, Castleton Care Center, filed a motion to compel arbitration pursuant to the terms that were

31. *Id.*

32. *Id.*

33. *Id.* at 745.

34. *Id.* at 746.

35. *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 414 (Ind. Ct. App. 2004).

36. *Id.*

contained in the nursing home admission agreement.³⁷ The trial court found on behalf of the nursing home and ordered that the wrongful death and survival issues would have to be arbitrated according to the terms of the nursing home admission agreement.³⁸

The estate appealed, arguing that the trial courts order was erroneous on four grounds. First, the admission contract was unenforceable as it was an unconscionable adhesion contract. Second, the Arbitration clause of the contract conflicts with the Federal Arbitration Act. Third, that the waiver of the decedent’s constitutional right to a jury trial was unknowing and involuntary. In addition, the personal representative of the estate was not a party or in privity with a party to the contract.

In reviewing the Estate’s four arguments the court of appeals reviewed the language contained in the admission contract which read as follows:

A. Preliminary Statements:

Patient [i.e., Bagley] individually or by and through Patient’s Legal Representative (hereinafter referred to as Patient) has considered appropriate care settings and is desirous of receiving care at this Center; and Patient has reviewed this **ADMISSION AND FINANCIAL CONTRACT**, has had opportunity to ask questions of Center personnel about the contract and understands that admission to this Center constitutes agreement to be bound by said **ADMISSION AND FINANCIAL CONTRACT . . .**

* * * * *

H. Dispute Resolution Procedure:

1. INITIAL GRIEVANCE PROCEDURE: The parties agree to follow the Grievance procedure described in the patient Rights Booklet for any claims or disputes arising out of or in connection with the care rendered to patient by Center and/or its employees. Patient should know that Center is prepared to mediate any concerns at any time upon patient request . . .

2. MEDIATION: In the event there is a dispute and/or disputes arising out of or relating to (i) this contract or the breach thereof or any tort claim; or (ii) whether or not there has been a violation of any right or rights granted under state law, and the parties are unable to resolve such dispute through negotiation, then the parties agree in good faith to attempt to settle the dispute by mediation administered by Alternate Dispute Resolution Service of the American Health Lawyers Association before resorting to arbitration. . . .

3. ARBITRATION: Any disputes not settled by mediation within 60

37. *Id.* at 416.

38. *Id.*

days after a mediator is appointed shall be resolved by binding arbitration administered by the Alternate Dispute Resolution Service of the American Health Lawyers Association and judgment may be entered in any court having jurisdiction thereof. . . . A signature line, bearing Sanford's signature, appears immediately following the arbitration provision.³⁹

The court of appeals noted that Indiana has a strong policy favoring enforcement of arbitration clauses.⁴⁰ The court noted that before it could compel arbitration it must first resolve any claims relating to the validity of the contract which contained the arbitration clause. The court further noted that judicial inquiry is limited to the validity of the contract itself and not the construction of the arbitration clause.⁴¹

The court stressed that parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate, and that arbitration agreements will not be extended by construction or implication.⁴²

The court addressed each of the estate's arguments.

First, as to the issue of the contract being a contract of adhesion the court found that "[a] contract is not unenforceable merely because one party enjoys advantages over another."⁴³ The court found that there was a heading that clearly stated "ARBITRATION" and that even more compelling that directly below the arbitration section was a signature line, which bore the signature of, Sanford, the patient's legal representative.⁴⁴

The court applied Indiana contract law, noting that a person is "presumed to understand and assent to the terms of any contract that he or she signs."⁴⁵ Accordingly, the court found that because Sanford had executed the signature line that she is presumed to have read and understood its contents.

The second argument that the Estate put forth was that the admission contract conflicts with the Federal Arbitration Act⁴⁶ which discusses admission practices in the case of a nursing home. The Estate argued that the arbitration clause was "other consideration" and was therefore in violation of the Federal Arbitration Act.⁴⁷

The court, employing a doctrine of statutory construction, concluded that the general phrase "'other consideration,' when followed by a specific enumeration of the terms gift, money, or donation, does not encompass an arbitration

39. *Id.* at 415 (alterations in original).

40. *Id.* at 416.

41. *Id.*

42. *Id.*

43. *Id.* at 417 (citing *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980)).

44. *Id.* at 417-18.

45. *Id.* at 418 (citing *Buschman v. ADS Corp.*, 782 N.E.2d 423, 428 (Ind. Ct. App. 2003)).

46. 42 U.S.C. § 1396r(c)(5)(A)(iii) (2000).

47. *Sanford*, 813 N.E.2d at 419.

agreement.”⁴⁸ The court noted that requiring a nursing home admittee to sign an arbitration agreement is not analogous to charging an additional fee or other consideration for admittance to the facility. The court concluded that an arbitration provision merely establishes the forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany that forum.⁴⁹

The Estate’s third argument focused on whether the arbitration clause unconstitutionally deprived the Estate of a jury trial.⁵⁰ Article I, section 20 of the Indiana Constitution provides that: “In all civil cases, the right of trial by jury shall remain inviolate.”⁵¹ However, the court of appeals went on to note that this constitutional right is not absolute and may be waived.⁵² In deciding upon this issue the court reviewed Trial Rule 38 (E) which governs a jury trial of right, and which states: “(E) Arbitration. Nothing in these rules shall deny the parties the right by contract or agreement to submit or to agree to submit controversies to arbitration made before or after commencement of an action thereon or deny the courts power to specifically enforce such agreements.”⁵³

The court noted that this trial rule recognizes a “very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties.”⁵⁴ The court concluded that the patient’s legal representative, by signing the admission contract which contained the arbitration clause, effectively waived the Estate’s right to a trial by jury and “agreed to submit any future controversies to arbitration.”⁵⁵

The Estate’s final argument is that it is not bound by the arbitration clause because it was not party to or privy to the contract.⁵⁶ In its analysis the court noted that an arbitration agreement like any other contract can only bind those who are in privity with a party. The court noted that “[p]rivity is found if a non-party holds ‘a mutual or successive relationship with [a party] with regard to property or [when] their interests are as identical as to represent the same legal right.’”⁵⁷

The court found this argument unpersuasive because regardless of whether or not there was privity to the admission contract regarding the arbitration clause, the Estate’s survival and wrongful death claims only arose out of Castleton Center’s alleged negligent treatment of the patient.⁵⁸ The court of appeals concluded that the trial court was correct in ordering that the nursing home

48. *Id.*

49. *Id.*

50. *Id.* at 420 (quoting *Scott v. Crussen*, 741 N.E.2d 743, 746 (Ind. Ct. App. 2000)).

51. IND. CONST. art. I, § 20.

52. *Sanford*, 813 N.E.2d at 420.

53. *Id.*

54. *Id.*

55. *Id.* (quoting *Ransburg v. Richards*, 770 N.E.2d 393, 395 (Ind. Ct. App. 2002)).

56. *Id.*

57. *Id.* (quoting *Isp.com LLC v. Theising*, 805 N.E.2d 767, 776 (Ind. 2004)) (alterations in original).

58. *Id.* at 421.

agreement must be arbitrated as opposed to being litigated in the courts.

C. Golub v. Giles

Another interesting decision made by the Indiana Court of Appeals concerned the involuntary commitment of a mentally ill patient to a mental health facility, pursuant to the definition of what constitutes a "grave disability" as defined by Indiana Code section 12-7-2-96. In deciding to hear this case, the court noted that while the issues were moot, that it would still decide the case on the merits because the issue of involuntary commitment is a matter of great public interest and one that is likely to recur.⁵⁹

Golub was a thirty-eight-year-old man who suffered from bipolar disorder.⁶⁰ Golub's mental illness caused him to be detained on an emergency basis at least three times between 1998 and August 2003.⁶¹ Due to Golub's behavior in April 2004, Indianapolis police officers detained Golub and transported him to Community Hospital North. Golub was examined by Dr. David Giles who had reaffirmed his prior diagnosis of bipolar disorder with psychotic symptoms, which had been made in August 2003.⁶²

There were a number of factors that Dr. Giles noted concerning Golub's behavior in the months and days leading up to April 2004, which caused Dr. Giles to reaffirm his diagnosis.⁶³ Specifically Golub had: "(1) lunged at a hotel manager, (2) threatened his brother, sister-in-law, and other family members, and (3) claimed that actor Leonardo DiCaprio assaulted him."⁶⁴ Further, Golub's brother, Marshall, "witnessed Golub attempting to direct traffic on Shadeland Avenue, and upon inquiry Golub stated: 'I'm talking to the birds. I'm talking to people up there. Just leave me alone.'"⁶⁵ Marshall Golub also noted that Golub had damaged the walls in the hotel where he was living, he had also destroyed the TV, taped up the electrical outlets, removed the fire alarm and taken all the pictures off the wall. Golub also left a voicemail for Marshall's wife, Lisa Golub, "accusing her of being part of the Federal Bureau of Investigation, accusing her of stalking and watching him, and informing her that he was sitting across the street from her house in a school watching her turn lights on and off."⁶⁶

As a result of Golub's behaviors Dr. Giles filed an Application for Emergency Detention of a Mentally Ill and Dangerous Person.⁶⁷ A commitment hearing was held on April 19, 2004, and the trial court issued an order of regular commitment, which committed Golub to Community Hospital North/Gallahue

59. *Golub v. Giles*, 814 N.E.2d 1034 (Ind. Ct. App. 2004), *trans. denied* (Ind. Feb. 17, 2005).

60. *Id.* at 1036.

61. *Id.* at 1037.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Mental Health Services as an inpatient.⁶⁸ The trial court's order of commitment provided that Golub would be committed as an inpatient. However, if it became the opinion of the staff that Golub no longer needed in-patient care, he "may be transferred to out-patient status for the balance of the commitment period, or from time to time as necessary."⁶⁹ The order also imposed five special conditions, requiring Golub to:

1. Take all medications as prescribed.
2. Attend all clinic sessions as scheduled.
3. Maintain his address and his telephone number on record if and when [Golub] is placed on out-patient commitment.
4. Not harass or assault family members or others.
5. Not use alcohol, or drugs, other than those prescribed by a certified medical doctor.⁷⁰

Golub appealed. On appeal, Golub argued that because he was "able to feed and clothe himself and otherwise function independently in society," that there was not clear and convincing evidence of a "grave disability" within the meaning of Indiana Code section 12-7-2-96.⁷¹

In reviewing this case, the court of appeals noted that the burden falls on the petitioner to prove by clear and convincing evidence that: "(1) the individual is mentally ill and either dangerous or gravely disabled; and (2) detention or commitment of that individual is appropriate."⁷² The court then looked at the definition of "gravely disabled," which is contained in Indiana Code section 12-7-2-96 and defines "gravely disabled" as:

[A] condition in which an individual, as a result of mental illness, is in danger of coming to harm because the individual:

(1) is unable to provide for that individual's food, clothing, shelter, or other essential human needs; or

(2) has a substantial impairment or an obvious deterioration of that individual's judgment, reasoning, or behavior that results in the individual's inability to function independently.⁷³

At the detention hearing, Dr. Giles asserted that Golub was "gravely disabled" because Golub had a "substantial impairment or an obvious deterioration of his judgment, reasoning, or behavior that results in his inability to function independently."⁷⁴ Dr. Giles based this conclusion on the fact that Golub fails to accept that he is mentally ill and refuses to cooperate with his treatment.⁷⁵

68. *Id.* at 1038.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (quoting IND. CODE § 12-26-2-5(e) (2004)).

73. *Id.* at 1038-39.

74. *Id.* at 1039.

75. *Id.*

The court of appeals noted that the trial court was correct in concluding that Golub was “gravely disabled” because there was sufficient evidence presented at the hearing by Dr. Giles. Dr. Giles, who had conducted multiple interviews with Golub and Golub’s family members and who had an opportunity to review Golub’s medical records from past admissions, testified that it was his professional opinion that Golub suffered from a psychotic illness, namely bipolar disorder with psychotic symptoms.⁷⁶ Additionally, the court noted that it was established that Golub had a “five-year history of mental illness requiring hospitalizations and causing paranoia, delusional thoughts, and threatening and destructive behavior.”⁷⁷ Dr. Giles also testified that Golub “would benefit from taking anti-psychotic drugs,” however, Golub “refused to cooperate.”⁷⁸ The court of appeals noted that the trial court, as fact finder, could reasonably conclude that Golub was “gravely disabled” and should therefore be involuntarily committed.⁷⁹

II. HIPAA AND PRIVACY ISSUES

Individual rights were a paramount objective of the Administrative Simplification standards of the Health Insurance Portability and Accountability Act when passed in 1996. Of these rights, access to one’s medical records was a chief concern of Congress and has since been at the forefront of discussion in many states, including Indiana. Effective retroactively to July 1, 2003 and passed by the Indiana General Assembly seemingly unnoticed in the 2004 General Session, Section 24 of Public Law 78 changed the provision of an existing retrieval charge for providing copies of medical records in Indiana Code section 16-39-9-3 from a “retrieval” to a “labor” charge.⁸⁰ Although subtle, this purely semantic change has significant implications for both health care providers and individuals when dealing with granting or requesting access to medical records in the State of Indiana.

Unchanged by the substitution in verbiage, Indiana law allows a health care provider to collect a charge of twenty-five cents (\$0.25) per page for making and providing copies of medical records.⁸¹ Providers may also collect a fifteen dollar (\$15.00) *labor charge* in addition to the per page charge. If a provider collects the labor charge, the provider may not impose the per page charge on the first ten copies of the requested medical record.⁸² The purpose of the change was not to alter the allowable charge for copies, but rather to bring Indiana law into compliance with federal regulations.

The objective of many state medical record laws is to achieve a balance between the competing interests involved in ensuring access to, and releasing of, health information. On one hand, the individual patient has an undeniable

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See Act of March 19, 2004, § 24, 2004 Ind. Acts 78.

81. IND. CODE § 16-39-9-3 (2004).

82. *Id.*

interest in their private health information, which includes reasonable access to his or her medical record. In recognizing this need for access by patients, health care providers, however, must consider several factors that affect the cost of releasing the information. These cost factors range from labor and technological costs involved in storage, recovery, re-filing of the information to capital costs associated with storage facilities, copying equipment, and supplies related to mailing and delivery.

The Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPAA," was enacted to improve the portability and continuity of health insurance coverage, to combat waste, fraud, and abuse in health care, to promote the use of health savings accounts, to improve access to long term care, and to simplify the administration of health insurance.⁸³ Title II of HIPAA contains the Administrative Simplification rules, which includes certain Privacy and Confidentiality Standards to protect the confidentiality and security of protected health information ("PHI") as well as to bestow certain individual rights. The Privacy and Confidentiality Standards, referred to collectively as the Privacy Rule, regulate the use and disclosure of PHI by covered entities (defined as health care providers, health plans, and clearinghouses).⁸⁴ PHI, with certain exceptions, is all individually identifiable health information, including demographic information, transmitted or maintained in any format, including paper and electronic records.⁸⁵

As a general rule, any standard under HIPAA's Privacy regulations that is contrary to a provision of state law preempts the provision of state law, unless a stated exception or condition is found.⁸⁶ Among others, these conditions include that a provision of state law is more stringent than the privacy standard or that a provision of state law provides for mandatory reporting of various health care conditions or incidents. A state law will be deemed "more stringent" when it either provides individuals with greater access to information or restricts the use or disclosure of health information in circumstances under which it would otherwise be permissible under the federal Privacy standard.⁸⁷

In providing access to one's health information, HIPAA permits covered entities to impose reasonable, cost-based fees for the costs associated with copying and postage when granting an individual's request to review their medical record.⁸⁸ In other words, fees that are not cost-based, even if permitted by state statute, are most likely contrary to HIPAA regulations and therefore will be preempted by HIPAA. Such fees must be based on actual production costs incurred by the entity, which may include the cost of labor, supplies, and postage.⁸⁹ Excepted from this provision is a specific reference to costs associated with the search and retrieval of requested information. This limitation on the

83. 42 U.S.C. §§ 1320d to 1320d-8 (2000).

84. 45 C.F.R. § 160.103 (2002).

85. *Id.*

86. *Id.* § 160.203.

87. *Id.*

88. *Id.* § 164.524(c).

89. *Id.*

charges a health care provider can impose was ostensibly designed to minimize impediments in accessing one's medical records. Past clarification on this issue by the Department of Health and Human Services ("DHHS") that "the fee may not include costs associated with searching for and retrieving the requested information," strongly suggests that charges specifically associated with the retrieval of medical records are not permissible.⁹⁰ A covered entity may, however, charge a fee for preparation of a summary or explanation of protected health information in lieu of the actual medical records when requested to do so by the patient.

Widely-held interpretation of HIPAA's restrictions on fees associated with accessing health records coupled with the past DHHS guidance appears to have been the impetus to the recent changes by the General Assembly. In fact, the Indiana Legislative Services Agency stated in its legislation summary, "[t]he change of language should allow health care providers to continue to charge a minimal amount of labor costs associated with the cost of copying records."⁹¹

III. LABOR AND EMPLOYMENT UPDATE

Section XI of the 2003 Survey⁹² traced the progression of *Highhouse v. Midwest Orthopedic Institute*.⁹³ At the time of last year's publication, the Indiana Supreme Court had granted transfer but had not yet issued a ruling. The court's opinion, which was issued on May 5, 2004, merits further review.

Midwest Orthopedic Institute, P.C. ("MOI") employed Dr. Highhouse as an orthopedic surgeon. Pursuant to the terms of Dr. Highhouse's employment agreement, he received a base annual salary of \$250,000 and an annual bonus for each calendar year payable February 28 of the following year.⁹⁴ In practice, the bonus was paid at the end of each calendar quarter.⁹⁵ The bonus was calculated on the basis of Dr. Highhouse's production and the expenses of MOI's overall operations.⁹⁶

In March 1999, Dr. Highhouse gave notice of his resignation effective on June 30, 1999.⁹⁷ After he resigned, MOI continued to receive collections for services Dr. Highhouse rendered prior to his departure. MOI contended that Highhouse was entitled to no further compensation.⁹⁸ Dr. Highhouse sued,

90. U.S. Dep't of Health & Human Servs., Questions and Answers, at <http://answers.hhs.gov> (last modified July 18, 2003) ("If patients request copies of their medical records, are they required to pay for the copies?").

91. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT 2 (2004), available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1320.009.pdf>.

92. John C. Render & Neal A. Cooper, *Survey of Recent Developments in Health Care Law*, 37 IND. L. REV. 1161, 1209-10 (2004).

93. 807 N.E.2d 737 (Ind. 2004).

94. *Id.* at 738.

95. *Id.*

96. *Id.* at 740.

97. *Id.* at 738.

98. *Id.*

claiming he was entitled to bonus payments based on post-resignation receipts, and that the bonus constituted a “wage” entitling him, under the Indiana Wage Payment Statute,⁹⁹ to a payment of twice the unpaid amounts plus attorney’s fees.¹⁰⁰ The trial court held that Dr. Highhouse was not entitled to bonus payments for collections after the effective date of his resignation.¹⁰¹ The appellate court reversed, finding that Dr. Highhouse was entitled to the bonus payments and that the unpaid bonus constituted “wages” for purposes of the Indiana Wage Payment Statute.¹⁰² The Indiana Supreme Court granted transfer to determine whether Dr. Highhouse was entitled to the bonus payments and whether such payments constituted a “wage” under the Wage Payment Statute.

The first issue the court addressed was whether or not Dr. Highhouse was entitled to bonus payments based on the post-resignation collections MOI received for services that Dr. Highhouse rendered prior to his departure. The court of appeals took the view that Dr. Highhouse’s right to bonus payments vested at the time he performed the services that the bonus was based upon.¹⁰³ The Indiana Supreme Court agreed, finding that as a matter of contract law, Dr. Highhouse was entitled to a bonus based on post-resignation collections.¹⁰⁴

MOI argued that the plain language of the contract prohibited Dr. Highhouse from receiving bonuses after resigning. In support of its argument, MOI cited the termination without cause provision of the employment agreement, which provided that Dr. Highhouse would only receive his regular compensation if MOI terminated the agreement early and gave ninety-day notice. The court, however, was unconvinced, finding that this provision did not appear to apply to resignation and did not unambiguously terminate the right to payment after the effective date of a resignation.¹⁰⁵ Moreover, the court noted that absent some other arrangement or policy, when an employer makes an agreement to provide compensation for services, the employee’s right to compensation vests when the employee renders the services.¹⁰⁶ Because Dr. Highhouse’s employment agreement did not unambiguously call for termination of bonus payments as of his resignation, the court held that Dr. Highhouse was entitled to the bonus based on post-resignation collections for his services.¹⁰⁷

The second issue the court addressed was whether Dr. Highhouse had a right to statutory penalties for MOI’s alleged failure to pay “wages” every two weeks or semi-monthly under the Wage Payment Statute.¹⁰⁸ “Wage” is defined by

99. IND. CODE § 22-2-5-1 (2004).

100. *Highhouse*, 807 N.E.2d at 738.

101. *Id.*

102. *Id.*

103. *Id.* (citing *Highhouse v. Midwest Orthopedic Inst.*, 782 N.E.2d 1006, 1011 (Ind. Ct. App. 2003)).

104. *Id.*

105. *Id.* at 739.

106. *Id.* (citing *Baessler’s Super-Valu v. Ind. Comm’r of Labor*, 500 N.E.2d 243, 246 (Ind. Ct. App. 1986)).

107. *Id.*

108. *Id.*

statute as “all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount.”¹⁰⁹ The appellate court concluded that a bonus is a “wage” under the statute if the bonus “directly relates to the time than an employee works, is paid with regularity, and is not dictated by the employer’s financial success.”¹¹⁰ Although the court agreed with the appellate court’s formulation of the test of “wages,” the court concluded that Dr. Highhouse’s bonus, which depended partially upon the results of MOI’s operations, was not a wage.¹¹¹ Dr. Highhouse’s bonus turned on both his productivity and also on the expenses of MOI’s operations.¹¹² Although Dr. Highhouse’s efforts contributed to the calculation of his bonus, they were not the sole factor.¹¹³ The court concluded that Highhouse’s bonus presented the same problem as those discussed in *Pyle v. National Wine & Spirits Corp.*,¹¹⁴ *Herremans v. Carrera Designs, Inc.*,¹¹⁵ and *Manzon v. Stant Corp.*¹¹⁶

Finally, the court highlighted the practical reasons why Dr. Highhouse’s bonus was not a “wage.” Namely, his bonus was not consistent with the time constraints imposed by the Wage Payment Statute, which requires wages to be paid within ten days of the date they are “earned.”¹¹⁷ Because Dr. Highhouse’s bonus was tied to collections for his services, substantially more than ten days would be needed in order to calculate the bonus amounts. Moreover, the court found that the contract provision for annual bonus payments supported the view that the bonus was not a “wage.”¹¹⁸ Accordingly, the case was remanded to the trial court, Dr. Highhouse having prevailed on his claim for bonuses calculated on collections after June 30, 1999, while MOI prevailed on the claim for non-payment of wages under the Wage Payment Statute.¹¹⁹

109. *Id.* (quoting IND. CODE § 22-2-9-1).

110. *Id.* (citing *Highhouse v. Midwest Orthopedic Inst.*, 782 N.E.2d 1006, 1013-14 (Ind. Ct. App. 2003)).

111. *Id.* at 740.

112. *Id.*

113. *Id.*

114. 637 N.E.2d 1298 (Ind. Ct. App. 1999) (stating that discretionary bonuses based on financial success of employer were not “wages” for purposes of the Wage Claims Statute).

115. 157 F.3d 1118, 1121-22 (7th Cir. 1998) (stating that plaintiff’s pay based not on “his own time or effort or product . . . but on the profits of his plant” not a wage).

116. 138 F. Supp. 2d 1110, 1113 (S.D. Ind. 2001) (stating that bonus based on “the attainment of financial targets established by [the employer] and the achievement of individual personal objectives” was not a wage).

117. *Highhouse*, 807 N.E.2d at 740 (citing *Manzon*, 138 F. Supp. 2d at 1114).

118. *Id.*

119. *Id.* at 740-41.

IV. MEDICARE/MEDICAID UPDATE

A. Medical Error Reporting System

On January 10, 2005, newly inaugurated Indiana Governor Mitchell E. Daniels, Jr., issued Executive Order 05-10¹²⁰ directing the establishment of a medical error reporting system (“MERS”) for Indiana hospitals. The Executive Order (“EO”) cites a landmark report by the Institute of Medicine, along with other evidence, which demonstrated that medical errors are among the leading causes of death in the United States and impose an enormous economic cost on families and businesses. Hospitals across the country are implementing MERS to improve healthcare with successful implementation reducing the frequency of medical errors and potentially revealing the causes of errors. The EO states that Indiana hospitals are not currently required to implement a MERS and the successful implementation of a MERS would likely radically improve Hoosier healthcare and lessen healthcare costs.

Therefore, the Governor is directing the Department of Health “as soon as practicable” to promulgate regulations, and proposed legislation, if necessary, requiring each Indiana hospital to implement a MERS. The Department of Health is further directed to “confer with various representatives of the State’s hospitals, physicians, nurses, pharmacists, and quality improvement experts and [to] consult best practice guides, including the 10-measure ‘starter set’ of quality reporting indicators that are supported by the federal Hospital Quality Initiative, to develop minimum standards applicable to every MERS in the State.”¹²¹

To ensure that each MERS is effective, the EO calls for minimum MERS requirements, including assurance that patients’ and healthcare professionals’ identities are kept confidential and not discoverable in court or administrative proceedings, the system not be used as the basis for punishment of a healthcare professional, the system require healthcare professionals to report medical errors promptly, and the system require hospitals to report all MERS data to the Department of Health.¹²²

B. Change to Indiana Medicaid Hospital Appeal Deadline

Under Indiana Code section 12-15-13-3(e), hospitals had 180 days to either repay or appeal a determination by the Office of the Secretary of Family and Social Services that it had received an overpayment from the Medicaid program. All other providers under the statute had sixty days to appeal an overpayment determination. Agency practice was to inform providers, including hospitals, of the sixty-day time limit in which to appeal. Effective July 1, 2004, the statute was amended to change the deadline to repay and/or appeal an overpayment determination to sixty days from the date of the notice for all providers, including

120. Exec. Order No. 05-10, 28 Ind. Reg. 1900 (Mar. 1, 2005), available at http://www.in.gov/gov/eo/EO_05-10_Medical_Error_Reporting.pdf.

121. See CTRS. FOR MEDICARE AND MEDICAID SERVS., HOSPITAL QUALITY INITIATIVE OVERVIEW (Mar. 2005), available at <http://www.cms.hhs.gov/quality/hospital/overview.pdf>.

122. *Id.*

hospitals.¹²³ Subsequently, a Proposed Rule was published on October 1, 2004 in the Indiana Register to amend the corresponding regulations.¹²⁴ The Final Rule amending the regulations was published April 1, 2005.¹²⁵

While the statute under Title 12 (Human Services), Article 15 (Medicaid) has been amended to permit hospitals only sixty days to repay or appeal an overpayment determination, the statute under Title 4 (State Offices and Administration), Article 21.5 (Administrative Orders and Procedures) regarding hospital Medicaid reimbursement determinations has not been amended. Under Indiana Code section 4-21.5-3-6(a)(3) and (4), notice is required to be given for “[a] notice of program reimbursement or equivalent determination or other notice regarding a hospital’s reimbursement issued by the office of Medicaid policy and planning or by a contractor of the office of Medicaid policy and planning regarding a hospital’s year end cost settlement” and “[a] determination of audit findings or an equivalent determination by the office of Medicaid policy and planning or by a contractor of the office of Medicaid policy and planning arising from a Medicaid postpayment or concurrent audit of a hospital’s Medicaid claims.”¹²⁶

The following section, Indiana Code section 4-21.5-3-7, states that to qualify for review a person must petition for review in writing that is filed, “[for] a determination described in section 6(a)(3) or 6(a)(4) of this chapter [see above], with the office of Medicaid policy and planning not more than one hundred eighty (180) days after the hospital is provided notice of the determination.”¹²⁷ Therefore, the appeal time frame for hospitals to appeal a notice of program reimbursement or equivalent notice regarding Medicaid reimbursement remains 180 days as that statute has not been amended. While the Final Rule to amend 405 Indiana Administrative Code 1-1.5-2 eliminates the language, “[a] hospital’s request for an appeal of an action described in IC 4-21.5-3-6(a)(3) and IC 4-21.5-3-6(a)(4) must be filed within one hundred eighty (180) days,”¹²⁸ the applicable statute has not been amended and the statute is controlling over a regulation.

C. Medicaid Case Law Update

1. *Survey Damages*—*Golden Years Homestead v. Buckland*.—On March 30, 2004, the U.S. District Court for the Southern District of Indiana ruled on three motions to dismiss brought by defendants in *Golden Years Homestead v. Buckland*.¹²⁹ *Golden Years Homestead* (“GYH”), a Medicaid certified nursing facility, brought suit against various employees and officials of the Indiana State

123. Act of March 19, 2004, § 3, 2004 Ind. Acts 78. (codified as amended at IND. CODE § 12-15-13-3 (2004)).

124. 28 Ind. Reg. 257 (Oct. 1, 2004) (amending IND. ADMIN. CODE tit. 405, r. 1-1-5 and r. 1-1.5-2).

125. 28 Ind. Reg. 2129 (Apr. 1, 2005).

126. IND. CODE § 4-21.5-3-6(a)(3), -(4) (2004).

127. *Id.* § 4-21.5-3-7(a)(3)(B).

128. See 28 Ind. Reg. 2129 (Apr. 1, 2005).

129. No. IP02-0771-C-B/S, 2004 WL 950596 (S.D. Ind. Mar. 30, 2004).

Department of Health (“ISDH”) in their individual capacities as well as the Centers for Medicare and Medicaid Services (“CMS”), including individual employees of CMS who train the ISDH surveyors and supervisors on how to conduct surveys of nursing facilities, asserting that defendants conspired to and did violate its constitutional right to due process and its right to be free from unreasonable searches. GYH also complained of statutory violations for unfair reporting and included state common law and statutory claims for malicious prosecution, abuse of process, and frivolous litigation.¹³⁰

The court addressed three motions to dismiss filed by defendants which focused on the court’s exercise of jurisdiction and whether or not GYH asserted any claims upon which relief can be granted. The court determined that it did have jurisdiction because, even though the state administrative appeal and current lawsuit were both born of the surveys conducted by ISDH,¹³¹ GYH’s pursuit of the current claim did not interfere with the state proceedings despite defendants’ arguments to apply the *Younger* abstention doctrine.¹³² The court also discredited defendants’ argument of Eleventh Amendment immunity stating simply, “[i]n short, the Eleventh Amendment to our Constitution does not bar suits against state officials or employees in their individual capacities . . . [N]or does the Eleventh Amendment bar a suit for injunctive relief or declaratory relief against state officials in their official capacities.”¹³³

The court further noted that defendants’ argument for qualified immunity,¹³⁴ as a basis to dismiss, was premature as an answer to the complaint had not yet been filed so the court could not simply assume that the individual defendants followed the federal mandates for survey procedures. Defendants also moved for dismissal for failure to state a claim arguing that GYH’s assertion that it has a right to be free from unreasonable search and seizure under the Fourth Amendment is without merit, as courts have routinely upheld regulatory framework that grants the government the right to conduct unannounced and unexpected surveys of nursing homes. As GYH did not question the authority of defendants to conduct the surveys, but alleged the surveys were conducted in

130. *Id.* at *1.

131. ISDH sent a team of employees to GYH in April 2000 to investigate a complaint. The survey resulted in citation of certain deficiencies. The surveyors returned in July 2000 and September 2000 with deficiencies cited at both visits. As a result of the initial survey the ISDH discontinued GYH’s nurse aid training program for two years. The July survey resulted in requiring GYH to conduct certain in-service training sessions and a bar on Medicaid payments for new admissions. Following the September survey, further in-service programs were directed and the ISDH indicated it would revoke GYH’s Medicaid certification if it did not come into compliance with all federal regulations by mid-October. GYH was found in compliance by the end of September at which time the revocation threat and payment ban were lifted. *Id.* at *1.

132. *Id.* at *2 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

133. *Id.* at *3 (citations omitted).

134. Qualified immunity protects governmental officials performing discretionary functions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know.” *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

a manner outside the statutory and regulatory guidelines, the court denied defendants' motion stating that, "[c]ertainly, a search can be unreasonable in manner or effect, though the authority to conduct it is unquestioned."¹³⁵

While the court did dismiss the conspiracy claims found in the complaints, the court denied the remainder of defendants' motions to dismiss permitting GYH to proceed with the remainder of its claims against the individual defendants.¹³⁶

2. *Indiana Family and Social Services Settlement Agreement*—*Kraus v. Hamilton*.—On September 23, 2004, the St. Joseph Superior Court approved a settlement agreement between a class of plaintiffs and the Indiana Family and Social Services Administration ("FSSA").¹³⁷ On December 18, 2000, plaintiffs Rodger Bennett and Tommy Jo Kraus, both with mental retardation and/or other developmental disabilities,¹³⁸ by guardians filed a complaint under 42 U.S.C. § 1983, among other statutes, against the Secretary of FSSA and the Assistant Secretary of the Office of Medicaid and Policy Planning ("OMPP"). Plaintiffs sought an injunction to prohibit the continued confinement of the plaintiffs and others similarly situated in nursing homes and to require the State of Indiana to develop a comprehensive plan for the placement of mentally retarded and developmentally disabled people "to live in integrated settings rather than in nursing homes and [to require] placement in a small group [Intermediate Care Facility for the Mentally Retarded ("ICF/MR")] or home and community based waiver program with reasonable promptness."¹³⁹

The Complaint alleged that the defendants failed to appropriately treat and accommodate the plaintiffs' disabilities resulting in the plaintiffs' segregation in nursing facilities where they were not provided with minimally adequate training, habilitation, or support services and where they remained "frozen on a 'home and community based waiver program list.'"¹⁴⁰ Plaintiffs claimed this treatment was in contravention of the Nursing Home Reform Act of 1987.

Pursuant to the settlement agreement, defendants agreed to take reasonable efforts to expand their capacity to provide waiver services and to seek to reduce, and, if possible, eliminate waiting time for class members so that the optimum number of persons seeking reimbursement for waiver services can benefit from waiver services.¹⁴¹ In addition, defendants agreed to seek to expand the number of persons who can be served under waivers for persons with developmental disabilities by increasing the number of waiver slots over the next four years.¹⁴² Defendants also agreed to disseminate information about the nature and availability of community services that are reimbursable under the waiver

135. *Id.* at *5.

136. *Id.* at *7.

137. *Kraus v. Hamilton*, No. 71D06-0012-CT-260 (St. Joseph Superior Ct. Sept. 23, 2004).

138. Complaint at 4, *Kraus* (No. 71D06-0012-CT-260) (citing section 12102(2)(A) of the Americans with Disability Act and section 794 of the Rehabilitation Act).

139. *Id.* at 3-4.

140. *Id.* at 3.

141. Settlement Agreement at 6, *Kraus* (No. 71D06-0012-CT-260).

142. *Id.* at 7.

program or under the state Medicaid plan through accessible, understandable, written, and visual materials as well as face to face meetings with class members.¹⁴³ Defendants did not admit to any failure to comply with applicable legal requirements and neither party made any concession as to the merits of the case or of the opposing parties' claims or defenses.¹⁴⁴

V. FRAUD AND ABUSE

A. Introduction

The federal Fraud and Abuse Anti-Kickback Statute is designed to prevent certain payments in connection with the furnishing of services reimbursable under the Medicare and Medicaid programs as well as other governmental health care initiatives.¹⁴⁵ This statute prohibits someone from knowingly and willfully soliciting, receiving, offering or paying remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in exchange for or to induce the referral of any item or service for which payment may be made in whole or in part under Medicare, Medicaid, or other government health care program.¹⁴⁶

B. Safe Harbor Regulations

Section 431 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003¹⁴⁷ requires the addition of a Safe Harbor Regulation related to medically underserved populations to the numerous, existing Safe Harbor Regulations. It must provide that remuneration in the form of a contract, lease, grant, loan, or other agreement between a public or non-profit health center and an individual or entity providing goods and services to the health center will not violate the Anti-Kickback Statute if such an agreement contributes to the availability or quality of services applicable to a medically underserved population. Although the Safe Harbor Regulation was to be published by December 7, 2004, as of this writing, the Secretary of the DHHS has not published such a regulation.

C. Advisory Opinions

The Office of Inspector General ("OIG") of DHHS issued nineteen Advisory Opinions during 2004. Of particular interest is OIG Advisory Opinion Number 04-17,¹⁴⁸ in which the OIG applies some of its comments and theory that profit

143. *Id.* at 10.

144. *Id.* at 19.

145. 42 U.S.C.A. §§ 1320a to 1320a-8b (West 2003 & Supp. 2004).

146. *Id.*

147. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 431, 117 Stat. 2066, 2287.

148. Office of Inspector Gen., U.S. Dep't of Health and Human Servs., Advisory Op. 04-17 (Dec. 17, 2004), available at <http://oig.hhs.gov/Fraud/docs/advisoryopinions/2004/AO0417.pdf>. [hereinafter Advisory Op.].

in certain contractual arrangements can be remuneration to which no Safe Harbor protection applies, as first described in the Contractual Joint Ventures Special Advisory Bulletin, which was issued in April 2003.¹⁴⁹

The proposed arrangement that was the subject of Advisory Opinion 04-17 involved a pathology laboratory controlled group of companies ("Path Lab Companies"). One entity included in the Path Lab Companies was intended to be a non-provider operating company ("Turnkey Operator") which was to be created to help physician groups establish "in house" pathology laboratories within their medical practices. Existing within the Path Lab Companies was also an entity ("Affiliated Lab") that provided traditional pathology laboratory services to physician groups.¹⁵⁰

The proposed arrangement involved physician groups establishing their own in-house pathology laboratories and then engaging the Turnkey Operator in order to acquire all necessary management and administrative services, equipment leasing, premises subleasing, technical, professional, and supervisory pathology services, and, if requested, billing services for such in-house laboratories. The Turnkey Operator planned to contract with physician groups specializing in urology, gastroenterology, or dermatology. Most of the pathology services to be provided by the physician groups with the aid of the Turnkey Operator would be surgical pathology services that have separate reimbursement for technical and professional components.¹⁵¹

In consideration for services rendered, each physician group would compensate Turnkey Operator a (i) flat, monthly fee, (ii) per-specimen fee, and (iii) if applicable, a fee for billing and collection services equal to five percent of the total net revenue of the physician group's in-house laboratory.¹⁵²

The OIG concluded that the proposed arrangement "could potentially generate prohibited remuneration under the anti-kickback statute."¹⁵³ The OIG was not able to exclude the possibility that the parties' contractual relationship was designed to permit the Path Lab Companies to "kickback" remuneration to the physician groups for referrals.¹⁵⁴ Factors that the OIG noted as particularly problematic included:

1. All referrals to the lab services provided by a particular physician group would come from that physician group.
2. The Path Lab Companies (through Affiliated Lab) would continue to be a competitor of the in-house laboratories established by the physician groups.
3. Each physician group would be expanding into a related line of business, pathology services, which would be dependent on referrals

149. Publication of OIG Special Advisory Bulletin on Contractual Joint Ventures, 68 Fed. Reg. 23,148 (Apr. 30, 2003).

150. Advisory Op. at 3.

151. *Id.*

152. *Id.*

153. *Id.* at 1.

154. *Id.* at 6.

from that physician group.

4. The physician groups would not actually participate in the operation of their in-house laboratories, but would contract out substantially all lab operations to the Turnkey Operator. The OIG felt the physician groups would commit almost nothing in the way of financial, capital, or human resources to the laboratory operations, and, therefore, would assume very little or no real business risk.
5. Each physician group would receive an economic benefit from the success of its in-house laboratory. In addition, by way of the consideration for services rendered, the Turnkey Operator would also receive an economic benefit from the success of such laboratory.¹⁵⁵

Finally, as in the Contractual Joint Ventures Special Advisory Bulletin, the OIG stated that its conclusion would not change even if each of the individual agreements making up the proposed arrangement could satisfy an Anti-Kickback Statute safe harbor because the OIG believes that the retention of profits from the pathology services by a physician group would not be protected by any safe harbor.¹⁵⁶

D. Discounts to the Uninsured by Tax-Exempt Hospitals

Historically, hospitals have charged uninsured patients full, undiscounted rates and, in many cases, aggressively pursued such patients for outstanding debt. The hospital industry took such an approach based on guidance received from CMS and the OIG that there could be negative legal and administrative consequences for not taking such positions, as well as the environment of aggressive fraud and abuse investigations and prosecutions.

The hospital industry sought clarification from CMS and the OIG about these issues. In response, CMS attempted to clarify its policies through a letter from Secretary of DHHS, Tommy Thompson, on February 19, 2004, addressed to Richard J. Davidson, President of the American Hospital Association, regarding the practice of the alleged overcharges.¹⁵⁷ Thompson claimed the concern raised by the hospital industry is “not correct and certainly does not reflect my policy.”¹⁵⁸ Released along with the letter was a CMS Question and Answer document.¹⁵⁹ On the same day, the OIG released a document similarly dismissing provider concerns.¹⁶⁰ Given the longstanding regulations and CMS policies that

155. *See id.* at 5-6.

156. *Id.* at 7.

157. Letter from Tommy G. Thompson, Sec’y, U.S. Dep’t of Health & Human Servs. of Health and Human Services, to Richard J. Davidson, President, Am. Hosp. Ass’n (Feb. 19, 2004), available at <http://www.hhs.gov/news/press/2004pres/20040219.html>.

158. *Id.*

159. *Id.*

160. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., HOSPITAL DISCOUNTS OFFERED TO PATIENTS WHO CANNOT AFFORD TO PAY THEIR HOSPITAL BILLS (Feb. 2, 2004), available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/2004/FA021904hospital>

prohibited discounts to uninsured patients and failing to pursue debt from such patients, the industry sought clarification of various issues. CMS held a Town Hall meeting in an attempt to clarify its policies, which, at times even appeared to contradict the approach taken by the OIG.

Also during 2004, numerous class action lawsuits were brought on behalf of uninsured patients against tax-exempt hospitals, related to alleged over-charging of such patients.¹⁶¹ This heightened scrutiny, along with the apparent relaxation of regulatory and policy interpretations by CMS and the OIG caused many hospitals to re-examine their charge structure, how and when they give discounts, and their charity care policies, often leading to modifications of such policies and procedures to be somewhat broader.

VI. LEGISLATIVE CHANGES

A. Indiana Comprehensive Health Insurance Association House Enrolled Act 1273

Indiana Comprehensive Health Insurance Association House Enrolled Act 1273 ("Act"), effective on January 1, 2005, made several important changes to the Indiana Comprehensive Health Insurance Association ("ICHIA").¹⁶² ICHIA is a nonprofit legal entity which assures that health insurance is available to each eligible Indiana resident applying to it for coverage.¹⁶³ ICHIA provides health insurance coverage for individuals who are not eligible for Medicaid or commercial health insurance because of their pre-existing condition or chronic disease or illness. ICHIA is funded in part by assessments or carrier, health maintenance organizations, limited service health maintenance organizations, and self-insurers providing health insurance or health care services in Indiana. All such organizations must be members of ICHIA. The remaining funding comes from premiums charged to enrolled insureds and subsidiaries from the state of Indiana. Included in the changes to ICHIA is a provision permitting it to negotiate rates and enter into contracts with individual health care providers and health care provider groups for the care of its insureds.¹⁶⁴

To deal with net losses incurred, if any, by ICHIA, the Act requires at the close of ICHIA's fiscal year that ICHIA shall determine its incurred losses for the year. Twenty-five percent of any net loss shall be apportioned among all members of ICHIA in proportion to their respective shares of total health insurance premiums received in Indiana during the same fiscal year. The remaining seventy-five percent of any net loss shall be paid by the state of Indiana.¹⁶⁵

discounts.pdf.

161. See generally *Lawsuits Challenge Charity Hospitals on Care for Uninsured*, WALL ST. J., June 17, 2004, at B1.

162. Act of Mar. 18, 2004, 2004 Ind. Acts 97.

163. IND. CODE § 27-8-10-2.1 (effective Jan. 1, 2005).

164. *Id.*

165. *Id.*

In setting annual premiums, ICHIA may, on October 1 of each year, adjust premiums equal to the percentage changes in medical cost experienced by it during the preceding fiscal year minus the percentage change in Indiana medical care component of the Consumer Price Index of the United States Bureau of Labor Statistics. In no event may an annual premium adjustment exceed ten percent.¹⁶⁶

The Act modifies the manner in which members of ICHIA may take tax credits in relation to assessments paid. Beginning on January 1, 2005, a member who has paid an assessment prior to that date and has not taken a tax credit is not entitled to carry forward unused credits. However, such a member may, beginning January 1, 2007, take a credit of not more than ten percent of the amount of assessments paid before January 1, 2005, against which a tax credit has not been taken before January 1, 2005. If this allowable maximum tax credit exceeds a member's liability for taxes, the member may carry the unused part of the tax credit forward to subsequent taxable years. The total tax credits taken under this provision may not exceed the total assessments paid by a member before January 1, 2005.¹⁶⁷

In making payments for medically necessary eligible expenses to health care providers for its insureds, the Act specifies that ICHIA payments must be based on its usual and customary fee schedule or a health care provider network arrangement previously negotiated.¹⁶⁸

The Act clarifies that health care providers shall not bill an ICHIA insured for any amount exceeding the payment made by ICHIA and any permissible co-payment, deductible, or coinsurance amounts.

All of the modifications to the Act are intended to improve the financial stability of ICHIA, reduce the burden upon its members, and insure that eligible individuals will continue to be able to obtain insurance.¹⁶⁹

B. Creation of Psychiatric Advance Directives

Effective July 1, 2004, a new type of advance directive was established by Senate Enrolled Act 133 ("Act").¹⁷⁰ The Act creates a new chapter of the Indiana Code authorizing certain individuals to execute an advance directive by written instrument expressing that individual's preference and consent to various treatments during subsequent periods of incapacity.¹⁷¹ In this respect, it parallels the existing statute regarding living wills.

A person creating a psychiatric advance directive must not then be incapacitated and the advance directive must be in writing, must name the individual creating it, and must name the treatment program and sponsoring entity in which the individual is enrolled, if applicable. Additionally, the

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Act of July 1, 2004, § 2, 2004 Ind. Acts 16.

171. *Id.*

advance directive must provide the name, address, and telephone number of the individual's treating physician or other treating mental health personnel. The advance directive must be signed by the individual creating it, and must be dated. It must also include the name, address, and telephone number of the designated health care representative under Indiana Code section 16-36-1.5-5(b)(4).¹⁷² Lastly, the advance directive shall contain the signature of the psychiatrist treating the individual entering into the psychiatric advance directive attesting to the appropriateness of the treatment preferences and to the individual's capacity.

An individual creating a psychiatric advance directive may specify directive treatment measures relating to admission for treatment, type, and method of administration of medications, restraint, seclusion, electroconvulsive therapy, or counseling.

A person who treats an individual who has executed a psychiatric advance directive is not subject to civil or criminal liability based on non-compliance with the directive, if the person is unaware that the individual has executed a valid psychiatric advance directive. The chapter does not prevent an attending physician from treating the patient in a manner that is in the patient's best interest.¹⁷³

VII. STARK LAW UPDATE

The federal Stark Law restricts physician referrals to an entity for the provision of certain "designated health services"¹⁷⁴ that may be payable under Medicare or Medicaid when the physician has a financial relationship with such entity.¹⁷⁵ On March 26, 2004, the Centers for Medicare and Medicaid Services ("CMS") issued "Phase II" of the final regulations ("Phase II")¹⁷⁶ for Section 1877 of the Social Security Act, better known as the Stark II legislation.¹⁷⁷ CMS first issued the proposed Stark II regulations in January 1998 ("Proposed Rule")¹⁷⁸ and, due to the broad scope of the regulations, bifurcated the final rule finalizing the process in two phases. Phase I of the final regulations was issued in January 2001.¹⁷⁹ After six years of operating under proposed regulations, the long awaited Phase II regulations have been issued to provide the health care industry further guidance on matters related to physicians' referrals to entities with which they have financial relationships. Overall, in Phase II, CMS sought

172. IND. CODE § 16-36-1.5-5(b)(4).

173. Act of July 1, 2004, § 5, 2004 Ind. Acts 16.

174. The term "designated health services" includes such items as radiology, clinical laboratory services, physical and occupational therapy services, and durable medical equipment ("DME") and supplies. 42 U.S.C.A. § 1395nn(h)(6) (2003).

175. *Id.* § 1395nn.

176. Medicare Program; Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships (Phase II), 69 Fed. Reg. 16,054 (Mar. 26, 2004) (to be codified at 42 C.F.R. pts. 411, 424) [hereinafter Physicians' Referrals].

177. 42 U.S.C.A. § 1395nn.

178. Physicians' Referrals, 69 Fed. Reg. at 16055.

179. *Id.*

to (i) address the comments to, and revise portions of, the Phase I final rule, and (ii) provide final regulations on the remaining provisions of the Stark II legislation not previously addressed in Phase I.

A. Overview

There are several key provisions in the Phase II regulations, which became effective July 26, 2004. First, with regard to physician compensation, Phase II provided clarification regarding how physicians may be compensated as members of a group practice, employees, or independent contractors, including the provision of productivity bonuses.¹⁸⁰ Second, Phase II provided an exception for existing relationships that inadvertently fall into noncompliance by granting the parties a ninety-day grace period to return to compliance, provided this exception can only be used once every three years for a specific physician.¹⁸¹

Third, Phase II clarified certain issues related to group practices and the In-Office Ancillary Exception which allows medical groups to provide designated health services ("DHS") within their practice.¹⁸² One important change was the clarification of the definition of "same building" to provide group practices with greater latitude to provide DHS at buildings in which they do not maintain a full time presence.¹⁸³ In addition, Phase II incorporated the current moratorium on physician ownership in specialty hospitals.¹⁸⁴ Fifth, in Phase II, CMS clarified certain existing exceptions, and created several new exceptions. Although no new DHS categories were added, CMS stated that it will continue to *consider* the application of the Stark II prohibitions to nuclear medicine.¹⁸⁵ Last, Phase II provided clarification regarding indirect compensation arrangements.¹⁸⁶

B. Detailed Summary

1. Physician Compensation.—Phase II provided clarification regarding the type of compensation arrangements an entity can have with physicians under (1) a Group Practice Arrangement; (2) the Employment Exception; (3) the Personal Services Exception; (4) the Fair Market Value Exception; and (5) Academic Medical Centers Exception. The greatest latitude for compensation exists for physicians within a group practice. Such physicians may receive (1) a productivity bonus based upon both personally performed services and services provided "incident to";¹⁸⁷ and (2) distributions from profits derived from DHS,

180. Note that percentage compensation arrangements were allowed. *Id.* at 16,066. In addition, Phase II created a safe harbor for establishing the fair market value of hourly payments to physicians. 42 C.F.R. § 411.351 (2005).

181. *Id.* § 411.325.

182. *Id.* § 411.355(b).

183. *Id.* § 411.355 (b)(2)(i).

184. *Id.* § 411.356 (c)(3).

185. Physicians' Referrals, 69 Fed. Reg. at 16,100. CMS also stated its intent to revisit the definition of outpatient prescription drugs in a future rulemaking. *Id.* at 16,106.

186. *See* 42 C.F.R. § 411.354 (2005).

187. *See id.* §§ 411.351; 410.26(a).

provided such distributions are not directly related to the physician's referrals of DHS to the group practice.¹⁸⁸ In addition, the compensation for these physicians does not have to be "set in advance."¹⁸⁹

For arrangements under the Employment Exception, a physician may be paid a productivity bonus based upon personally performed services,¹⁹⁰ but may not receive payment based upon referrals of DHS, either directly or indirectly as allowed for group practice physicians.¹⁹¹ In addition, the compensation for these physicians does not have to be "set in advance."¹⁹²

For those arrangements within the Personal Services Exception, the Fair Market Value Exception, and the Academic Medical Centers Exception, a physician's compensation must be "set in advance."¹⁹³ Under Phase II, the term "set in advance" requires that either (i) the aggregate compensation; (ii) time-based unit or per unit of service amount; or (iii) a specific formula (e.g., percentage compensation arrangement) is established prior to the commencement of the agreement.¹⁹⁴ While changes to the compensation model may occur during the term of the agreement, such changes should be carefully structured to assure continued compliance. Any productivity bonus¹⁹⁵ may take into account only those services personally provided by the physician-contractor.¹⁹⁶

The Phase II regulations also created a safe harbor for hourly payments made for a physician's personal services. Permissible payment arrangements include: (1) an hourly rate which is less than or equal to the average hourly rate for emergency room physician services;¹⁹⁷ and (2) an hourly rate which is determined by dividing by 2000 hours the fiftieth percentile compensation level for that physician's specialty, averaged between at least four nationally recognized physician compensation surveys.¹⁹⁸

2. *Exception for Certain Arrangements Involving Temporary Noncompliance.*—Phase II created a new exception to protect against inadvertent noncompliance with the Stark II rules. In order for the noncompliant period to qualify for the exception, the following conditions must be met: (1) the financial relationship between the entity and the physician has fully complied with Stark II for at least 180 days prior to the date the relationship became noncompliant; (2) the relationship became noncompliant for reasons beyond the control of the entity and the entity promptly took steps to rectify the noncompliance; (3) the financial relationship is in compliance with the Anti-Kickback Statute and other

188. *Id.* § 411.352 (2005).

189. *Id.*

190. However, this does not include "incident to" services.

191. 42 C.F.R. § 411.357(c) (2005).

192. *Id.*

193. *Id.* §§ 411.357(d); 411.357 (l); 411.355 (e).

194. *Id.* § 411.354(d)(1).

195. For example, a bonus based on the percentage of revenue generated.

196. 42 C.F.R. § 411.357(d).

197. However, there must be at least three emergency rooms in the relevant marketplace. *Id.* § 411.351.

198. *Id.*

applicable laws; and (4) the noncompliance was rectified within ninety days.¹⁹⁹ It is important to note that this exception may only be used once every three years for each physician, and does not apply to relationships under the Non-Monetary Compensation and Medical Staff Incidental Benefit Exceptions.²⁰⁰

3. *Changes to In-Office Ancillary Services Exception and Group Practice Definition.*—The final regulations amended certain provisions of the In-Office Ancillary Services Exception. This important exception protects the in-office provision of certain DHS that are truly ancillary to the medical services being provided by the physician practice.²⁰¹ Under this exception, DHS must be furnished to patients in the same building where the referring physicians provide their regular medical services, or, in the case of a group practice, in a central building, provided that certain conditions are met.²⁰²

Phase II retained the “centralized building” definition, which includes all or part of a building, including mobile vehicles, that is owned or leased on a full-time basis by a group practice and is used exclusively by the group.²⁰³ In addition, the regulations simplified the “same building” determination by developing three new alternative tests, which have varying numbers of hours per week that the referring physician, or in some instances, other members of the referring physician’s group practice, must practice at the office that is located in the “same building” that the DHS are furnished.²⁰⁴ The amount of physician services unrelated to the furnishing of DHS, required to be performed in the “same building,” was reduced from “substantial” to “some,” interpreted pursuant to its plain meaning.²⁰⁵ Finally the regulations clarified that physicians and group practices may purchase the technical component of mobile services²⁰⁶ and bill for such services pursuant to applicable Medicare rules.²⁰⁷

Under Stark II, a “group practice” can take advantage of certain exceptions under the law, although it is incorrect to state that there is a group practice exception. Rather, “group practice” is a definition, whereby once the definitional elements are met, the group is in position to meet a relevant exception, such as the in-office ancillary services exception. The Phase II regulations modified the “primary purpose” of the definition to make clear that the relevant inquiry is the current operation of the group practice.²⁰⁸ The regulations also eliminated the requirement for centralized utilization review under the “unified business test.”²⁰⁹

199. *Id.* § 411.353.

200. *Id.* § 411.353(f)(3)-(4). The Non-Monetary Compensation and Medical Staff Incidental Benefit Exceptions are discussed *infra* Part VII.B.6.a.iii.

201. *Id.* § 411.355(b).

202. *Id.*

203. *Id.* § 411.351.

204. *Id.* § 411.355(b)(2).

205. *Id.* § 411.355(b)(2)(A)(1).

206. Mobile services are not considered buildings for purposes of the in-office ancillary services exception. Physicians’ Referrals, 69 Fed. Reg. at 16,073.

207. *Id.*

208. *Id.* at 16,076.

209. *Id.*

Further, they reiterated that hospitals employing two or more physicians do not qualify as “group practices.”²¹⁰ Phase II also provided that a single legal entity may meet the definition if it is owned by another medical practice, provided such medical practice is no longer operating as a physician practice.²¹¹

The regulations declined to expand the group practice definition to permit independent contractors to fulfill the “two or more physicians” requirement.²¹² However, such requirement may be met by part-time employed physicians.²¹³ The regulations created a new twelve-month grace period for compliance with the “substantially all” test when the addition of a new member, who has relocated his practice to an existing group, would otherwise cause the group to fall out of compliance.²¹⁴ Finally, with regard to compensation, CMS allowed profit sharing or productivity bonuses to be based directly on services that are “incident to” the physician’s personally performed services.²¹⁵

4. *Specialty Hospitals*.—In accordance with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”), CMS revised the Hospital Ownership Exception to include the new eighteen-month moratorium on physician ownership of specialty hospitals.²¹⁶

5. *Clarifications and Modifications to Current Statutory Exceptions*.—

a. *The rental of office space and equipment*.—Phase II adopted the regulatory language of the Proposed Rule with regard to the rental of space and equipment with several modifications. The regulations allowed leases or rental agreements to be terminated with or without cause, as long as the parties do not enter into a new agreement within the initial one-year period of the lease.²¹⁷ In addition, CMS permitted month-to-month holdover leases for up to six months on the same terms as the original lease.²¹⁸ The “exclusive use” provision was modified to allow subleases in many cases, so long as the lessee or sublessee does not share the rented space or equipment with the lessor during the time it is leased.²¹⁹ The clarifications affirmed that per-click²²⁰ rental payments are permitted as long as the payments are fair market value and do not take into account the volume or value of referrals or other business generated between the parties.²²¹ Finally, under appropriate circumstances, lease payments may decrease as volume increases, provided such payment structure is commercially

210. *Id.* at 16,077.

211. 42 C.F.R. § 411.352(a) (2005).

212. Physicians’ Referrals, 69 Fed. Reg. at 16,077.

213. *Id.*

214. 42 C.F.R. § 411.352(c)(5).

215. *Id.* § 411.352(i)(1). See *id.* §§ 411.351, 410.26(a) for definition of “incident to” services.

216. *Id.* § 411.356 (c)(3).

217. *Id.* § 411.357(a)(2).

218. *Id.* § 411.357(a)(7).

219. *Id.* § 411.357(a)(3). Note, however, that the sublease arrangement may create an indirect compensation arrangement. Physicians’ Referrals, 69 Fed. Reg. at 16,085.

220. For example, per use or per service payments.

221. *Id.* § 411.357(a)(3).

reasonable and at fair market value.²²²

b. Bona fide employment relationships.—The Phase II regulations adopted the regulatory language of the Proposed Rule regarding bona fide employment relationships with the following modifications: (1) CMS eliminated the limitation on productivity bonuses and the addition of the “other business generated between the parties” language; and (2) narrowed the instances in which an employer may require an employee to refer to the employer.²²³ Such instances include: (1) the referring physician is compensated at fair market value; and (2) the referral restriction relates solely to the physician’s services covered by the scope of the employment and is reasonably necessary to effectuate the legitimate purpose of the relationship.²²⁴ The referrals requirement does not apply when the patient requests a different provider, the patient’s insurer mandates a different provider, or the referral is not in the patient’s best medical interest as determined by the physician.²²⁵

c. Personal services arrangements.—In addition to the compensation changes discussed above, Phase II made several modifications to the Personal Services Arrangement exception. First, CMS clarified the treatment of termination provisions to allow for the agreement to be terminated within the initial one-year period, with or without cause, so long as the parties do not enter the same or substantially the same arrangement during the initial one-year period.²²⁶ Further, payments from downstream subcontractors are included in the physician incentive plan exception.²²⁷ The regulations relaxed the requirements for separate contracts related to items or equipment used under the personal services exception.²²⁸ Lastly, the integration requirements²²⁹ were modified to allow for either the incorporation of other agreements, or the cross-referencing to a master list of contracts that is maintained centrally.²³⁰

d. Remuneration unrelated to the provision of DHS.—CMS stated that the Remuneration Unrelated to the Provision of DHS exception will be interpreted narrowly, and will protect only remuneration that is wholly unrelated to the provision of DHS.²³¹

e. Physician recruitment.—The Phase II regulations substantially modified the Proposed Rule regarding physician recruitment. First, a recruited physician must relocate his practice²³² either: (1) a minimum of twenty-five miles; or (2)

222. *Id.*

223. Physicians’ Referrals, 69 Fed. Reg. at 16,087-88.

224. *Id.* at 16,087. For example, the employer cannot require a part-time employee to refer patients seen outside of the scope of the part-time employment to the employer. *Id.*

225. *Id.*

226. 42 C.F.R. § 411.357(d)(1)(iv).

227. *Id.* § 411.357(d)(2); Physicians’ Referrals, 69 Fed. Reg. at 16,092.

228. 42 C.F.R. § 411.357(d)(1)(ii).

229. For instance, arrangement must be integrated into a single contract.

230. 42 C.F.R. § 411.357(d)(1)(ii).

231. Physicians’ Referrals, 69 Fed. Reg. at 16,093 (including, for example, the rental of residential property).

232. Relocation of a physician practice does not necessarily require the physician to change

such that the new medical practice derives at least seventy-five percent of its revenues from patients not historically treated by the physician.²³³ However, residents and physicians in practice one year or less are not subject to the relocation requirement described above.²³⁴ The final regulations also extended the exception to cover federally qualified health clinics ("FQHCs").²³⁵

Recruitment payments may be made to existing groups in connection with the recruitment of a new physician if the following conditions are met:

- (1) Except for costs incurred by the group, all other recruitment support is passed directly through or remains with the recruited physician;
- (2) For income guarantees, the allocation of overhead to the recruited physician may not exceed the actual additional incremental overhead attributable to the recruited physician;
- (3) The group must maintain records of actual cost and passed through recruitment support for at least five years;²³⁶
- (4) The recruitment payment may not take into account the value or volume of referrals the existing group makes to the hospital;
- (5) The group may not impose additional practice restrictions on the recruited physician²³⁷ other than those related to quality of care; and
- (6) The recruitment arrangement must not violate the Anti-Kickback statute or other applicable laws governing billing or claims submission.²³⁸

f. Isolated transactions.—This exception protects remuneration paid in an isolated financial transaction, for example a one-time sale of property or physician practice. Phase II modified the definition of "isolated transactions" to allow for appropriate post-closing adjustments and installment payments, if the following conditions are met: (1) the total aggregate payment is fixed before the first payment is made; and (2) payments are either immediately negotiable or are guaranteed by a third party, secured by a negotiable promissory note; or subject to a similar mechanism to assure payment in the event of default.²³⁹

g. Payments made by a physician for items or services.—This exception applies to certain fair market value payments from a physician to an entity in exchange for items provided or services rendered by the entity. The Phase II Rule removed the proposed exception for discounts.²⁴⁰ Previously, discounts were permitted provided the discount was passed on in full to the patients or their insurers and did not benefit the physician in any manner.²⁴¹

his residence.

233. 42 C.F.R. § 411.357(e)(2).

234. *Id.* § 411.357(e)(3).

235. *Id.* § 411.357(e)(5).

236. Such records must be made available CMS upon request. *Id.* § 411.357(e)(4)(iv).

237. Including, for example, covenants-not-to-compete.

238. *See* 42 C.F.R. § 411.357(e)(4).

239. Physicians' Referrals, 69 Fed. Reg. at 16,098.

240. *Id.* at 16,099.

241. *Id.*

6. *Regulatory Exceptions.*—Regulatory exceptions are those exceptions added by CMS under the limited authority granted by the Social Security Act to create exceptions that protect arrangements that have no risk of fraud and abuse.

a. *Modifications to existing regulatory exceptions.*—

i. *Academic medical centers.*—The Academic Medical Center exception applies to services provided by an academic medical center if certain conditions are met. The definition of an academic medical center was modified to permit hospitals or health systems that sponsor four or more approved medical education programs to qualify if they meet other specified criteria.²⁴² In addition, a safe harbor provision was added to clarify the meaning of “substantial academic services or clinical teaching services.”²⁴³ Lastly, the regulations were amended to cover research money used for teaching.²⁴⁴

ii. *Services furnished under certain payment rates.*—In Phase I, CMS defined DHS to exclude services that are reimbursed by Medicare as a part of a composite rate.²⁴⁵ Phase II deletes the ASC / ESRD / Hospice exception to prevent undue confusion with the new composite rate exception.²⁴⁶

iii. *Non-monetary compensation and medical staff incidental benefits.*—Compensation from an entity in the form of items or services, not including cash or cash equivalents, are protected by this exception if certain criteria are met.²⁴⁷ The \$300 and \$25 thresholds included in the exception will be increased annually for inflation.²⁴⁸ The listing of affiliated physicians in hospital advertising is a permissible incidental benefit, however the advertising or promoting of a physician’s private practice on the hospital’s website is not covered by this exception.²⁴⁹

iv. *Compliance training.*—Phase I created a new exception to protect compliance training provided by a hospital to a physician or immediate family member that practices in the hospital’s local community or service area, provided the training is held in the local community or service area. The final rule expanded this exception to include all DHS entities, and training addressing the requirements of a compliance program, state or Federal health care program or any Federal, state, or local law.²⁵⁰

b. *New regulatory exceptions.*—

i. *Anti-kickback law safe harbors.*—Phase II created two new regulatory

242. 42 C.F.R. § 411.355(e).

243. *Id.* § 411.355(e)(1)(i)(D).

244. *Id.* § 411.355(e)(1)(iii)(C).

245. Defined services include Ambulatory Surgery Center (“ASC”) services, Skilled Nursing Facility (“SNF”) Part A services, and End-Stage Renal Disease (“ESRD”) composite rate services. Physicians’ Referrals, 69 Fed. Reg. at 16,111.

246. *Id.*

247. *See* 42 C.F.R. §§ 411.357(k)(1); and (m).

248. *Id.* § 411.357(k)(2).

249. *Id.* § 411.357(m)(2).

250. *Id.* § 411.357(o). However, continuing medical education (“CME”) does not qualify under the exception. *Id.*

exceptions that incorporate Anti-Kickback Statute²⁵¹ safe harbors related to the following: (1) Obstetrical Malpractice Insurance Subsidies; and (2) Referral Services.²⁵²

ii. Professional courtesy.—The professional courtesy exception protects the provision of free or discounted health care items or services to a physician, the physician's immediate family member, or office staff, by an entity, under certain conditions. "Professional courtesy" is defined as the provision of free or discounted health care items or services to a physician or his or her immediate family member or office staff.²⁵³ The professional courtesy exception protects arrangements that meet the following criteria:

- (1) The professional courtesy is offered to all physicians on the entities' bona fide medical staff or in the entity's local community without regard to the volume or value of referrals or other business generated between the parties;
- (2) The health care items or services provided are of the type routinely provided by the entity;
- (3) The entity's professional courtesy policy is set out in writing and approved in advance by the entity's governing board;
- (4) The professional courtesy is not provided to any physician (or immediate family member) who is a Federal health program beneficiary, unless there is a good faith showing of financial need;
- (5) If the professional courtesy involves any whole or partial reduction of any coinsurance obligation, the insurer is informed in writing of the reduction; and
- (6) The arrangement does not violate the anti-kickback statute . . . or any Federal or State law or regulation governing billing or claims submission.²⁵⁴

iii. Charitable donations by a physician.—Phase II created this exception to protect bona fide charitable donations made by a physician (or immediate family member) to a DHS entity.²⁵⁵ Such donations generally must be made to charitable health care entity's general fund-raising campaign, or risk violation of the Anti-Kickback statute.

iv. Intra-family referrals.—A referring physician may make a referral to an immediate family member or an entity with which the immediate family member has a financial relationship if certain requisite conditions are met. First, the patient is in a rural area, as defined in the regulations.²⁵⁶ Except for services furnished in the home, no other person or entity must be available to furnish services in a timely manner within twenty-five miles of the patient's residence.²⁵⁷

251. See 42 U.S.C.A. §§ 1320a to 1320-8b (2003).

252. See 42 C.F.R. § 357(r) and (g), respectively.

253. *Id.* § 411.351.

254. *Id.* § 411.357(s).

255. *Id.* § 411.357(j).

256. See *id.* § 411.355(c)(1).

257. *Id.* § 411.355(j)(1)(ii).

For services furnished in the home, no other person or entity is available to furnish the services in a timely manner.²⁵⁸ The arrangement must not violate the Anti-Kickback Statute, and the referring physician must take reasonable steps to determine if other providers are available, provided such search does not have to exceed twenty-five miles from the patient's residence.²⁵⁹

v. *Retention payments in underserved areas.*—A Hospital or a FQHC may provide financial support to retain a physician in the Hospital or FQHC's service area under specified conditions. To be deemed permissible, the arrangement must be in writing, neither conditioned upon referrals by the retained physician, nor based upon the volume or value of referrals or other business generated by the parties, and the physician must not be prohibited from joining other hospitals' medical staff.²⁶⁰ Furthermore, the Hospital or FQHC must be situated in a Health Professional Shortage Area, or in an area with demonstrated need for the physician as determined by the Secretary in a formal advisory opinion.²⁶¹ The physician must also have a bona fide, firm, written recruitment offer from a hospital or FQHC to move at least twenty-five miles, and outside of the hospital or FQHC's service area.²⁶²

The retention payment is limited to the lower of: (1) the difference between the physician's current income and the income being offered to recruit the physician; or (2) the reasonable costs the hospital/FQHC would incur in replacing the recruited physician.²⁶³ The retention payment is subject to the same obligations and restrictions on repayment or forgiveness as in the bona fide offer.²⁶⁴ Further, the hospital or FQHC may not enter a retention arrangement with a particular physician more than once every five years.²⁶⁵ The arrangement must not violate the Anti-Kickback Statute.²⁶⁶

vi. *Community-wide health information system.*—Items or services may in some instances be provided to a physician to allow access to, and sharing of, electronic health care records and any complementary drug information systems, general health information, medical alerts and related information in order to enhance the community's overall health.²⁶⁷ The items or services must be principally used by the physician as part of the community-wide health information system, and not provided to a physician based upon volume or value of referrals or other business generated by the physician.²⁶⁸ Further, the community-wide health information systems must be made available to all providers, practitioners, and residents of the community who desire to

258. *Id.* § 411.355(j)(1)(iii).

259. *Id.* §§ 411.355(j)(1)(iv) and (j)(2).

260. *Id.* § 411.357(t)(1)(i).

261. *Id.* § 411.357(t)(1)(ii).

262. *Id.* § 411.357(t)(1)(iii).

263. *Id.* § 411.357(t)(1)(iv).

264. *Id.* § 411.357(t)(1)(v).

265. *Id.* § 411.357(t)(1)(vi).

266. *Id.* § 411.357(t)(1)(viii).

267. *Id.* § 411.357(u).

268. *Id.* § 411.357(u)(1).

participate.²⁶⁹ Again, the arrangement must not violate the Anti-Kickback Statute or other applicable laws.²⁷⁰

7. *Designated Health Services*.—Phase II made certain minor changes to the definition of designated health service. With regard to nuclear medicine, CMS declined at this time to include nuclear medicine in the definition of DHS; however, the inclusion of such will continue to be evaluated.²⁷¹ Several bone density tests were added as DHS under “radiology and certain other imaging services.”²⁷² Further, CMS clarified that radiology services performed immediately after a procedure to confirm the placement of an item placed during the procedure is not DHS.²⁷³ An updated CPT list of DHS services was included in the final regulations.²⁷⁴ Finally, in light of the expanded coverage of outpatient prescription drugs as a result of the MMA, CMS intends to revisit the definition of outpatient prescription drugs in a future rulemaking.²⁷⁵

8. *Indirect Compensation Arrangements*.—Phase II provided clarification regarding what will constitute an indirect compensation arrangement between an entity and a physician subjecting the relationship to the Stark II rules. Both excepted and non-excepted relationships are included in the “unbroken chain of financial relationships” that is required for an indirect compensation arrangement to exist.²⁷⁶ A referring physician may be treated as “standing in the shoes” of his or her wholly-owned professional corporation, thereby creating direct compensation arrangements.²⁷⁷ The meaning of direct and indirect ownership was explained, and the regulations affirmed that common ownership does not create an ownership interest by one common investor in another, but the investment interest in the common entity may be a link in the chain necessary to create an indirect compensation arrangement.²⁷⁸ The relationship between the “indirect compensation arrangement” definition and the “volume or value” and “other business generated” standards was also clarified.²⁷⁹

C. Conclusion

This section of the article is intended to provide highlights of the substantive provisions of Stark II, Phase II. Although Phase II provided some degree of clarity to prohibited financial relationships with physicians and, in some cases, expanded the scope of authorized arrangements, the far-reaching impact of its underlying substance continues to require all transactions between entities and

269. *Id.* § 411.357(u)(2).

270. *Id.* § 411.357(u)(3).

271. Physicians’ Referrals, 69 Fed. Reg. at 16,100.

272. *Id.* at 16,117.

273. *Id.* at 16,103.

274. *See id.* at 16,143.

275. *Id.* at 16,106.

276. 42 C.F.R. § 411.354(c)(2) (2005); Physicians’ Referrals, 69 Fed. Reg. at 16,058.

277. Physicians’ Referrals, 69 Fed. Reg. at 16,058.

278. *Id.* For example, in equipment leasing company joint venture entities. *Id.*

279. *See* 42 C.F.R. § 411.354(c)(3).

physicians to be carefully scrutinized for compliance with the statute and implementing regulations.

Although CMS created new exceptions that incorporate two of the federal Fraud and Abuse Anti-Kickback safe harbors, providers are cautioned to continue to carefully distinguish between the prohibitions of Stark II and the proscriptions contained in the Anti-Kickback Law. Stark II is a bright-line civil statute in which compliance is mandatory or a physician's referrals and ensuing billings are illegal. The Anti-Kickback Law is a criminal law, which encompasses more than physician referrals but is violated only when criminal intent exists to offer, pay, solicit, or receive remuneration in exchange for or to induce any services payable under government health care programs.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,¹ the appellate courts of Indiana addressed a number of cases involving automobile, general liability, homeowners, and commercial liability insurance questions. The most controversial cases focused upon whether insurance coverage existed for the diminished value of an automobile after it has been damaged from an accident and then repaired. This Article addresses the decisions of the past year, and analyzes their effect on the practice of insurance law.²

I. AUTOMOBILE CASES

A. *Automobile Policy Covered Diminished Value of Vehicle After Repair from Accident*

When an automobile has been involved in an accident, the insured and the insurer must decide whether it should be repaired or considered a total loss (i.e., whether the costs to repair are more than the car's fair market value). Most standard insurance policies generally provide that the insurer is responsible for the lesser amount needed to repair the automobile or its fair market value.³ After an insured has repaired his or her vehicle, the insured often contends that the vehicle has sustained a diminished value from its pre-accident condition.⁴ Until recently, no Indiana case had addressed whether a vehicle's diminished value is recoverable under an automobile insurance policy. During this survey period, the issue was addressed with three published decisions.

In *Allgood v. Meridian Security Insurance Co.*, the insured's vehicle was

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1. The survey period for this Article is approximately October 1, 2003, to September 30, 2004.

2. Other cases during the survey period, but not addressed in this Article include *Westfield Insurance Co. v. Yaste, Zent & Rye Agency*, 806 N.E.2d 25 (Ind. Ct. App. 2004) (involving action by insurer against broker for negligence and fraud) and *Dunaway v. Allstate Insurance Co.*, 813 N.E.2d 376 (Ind. Ct. App. 2004) (deciding whether an insurer waived a one-year policy limitation on actions against insurer).

3. One version provides:

A. Our Limit of liability for loss will be the lesser of the:

1. Actual cash value of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

Allgood v. Meridian Sec. Ins. Co., 807 N.E.2d 131, 132 (Ind. Ct. App.), *reh'g denied*, 812 N.E.2d 1065 (Ind. Ct. App. 2004).

4. See LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 175:47 (3d ed. 1998) ("A vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision."); see also *id.* § 175.54 (providing examples of policy limitations that do not allow depreciation to be deducted).

damaged in an automobile accident.⁵ Her insurance company paid for the costs to repair the vehicle, but did not pay for any diminished value. The insured filed a class action lawsuit against her insurance company contending that diminished value of the vehicle was a recoverable element of loss under the policy.⁶

The insurer filed a motion to dismiss, and the insured countered with a motion for summary judgment. The trial court granted the insurer's motion, and an appeal ensued.⁷ On appeal, the court observed that other jurisdictions were split on whether the diminished value of the vehicle was recoverable under an automobile policy.⁸

The court ultimately concluded that the policy language was ambiguous and that the vehicle's diminished value after repairs was a recoverable loss element.⁹ The court construed the ambiguous policy to include an obligation of the insurer "to restore to the insured a vehicle similar in appearance, function *and* value" as it existed at the time of the loss.¹⁰

After the court's ruling, the insurer requested a rehearing, and was joined by various insurance trade organizations as amici curiae.¹¹ The insurer and amici curiae suggested that the appellate court's present ruling adversely raised public policy concerns.¹² These concerns included that the extent of the diminished value could not be adequately determined until the vehicle was sold. Thus, there was no reasonable manner to calculate an insured's damages.¹³ However, the court rejected that argument by stating that personal property is valued in a number of situations without resorting to actual sale of the property.¹⁴ Nevertheless, the court placed the burden of proving diminished value upon the insured.¹⁵

The court also rejected the notions that a flood of class action lawsuits against insurers would likely occur, and that all insureds' policy premiums would be increased.¹⁶ However, the court did observe that insurers are free to include an exclusion for diminution in value of vehicles in their policies to avoid the risk.¹⁷

In *Dunn v. Meridian Mutual Insurance Co.*,¹⁸ a different district of the Indiana Court of Appeals was also asked to interpret whether diminution in value

5. *Allgood*, 807 N.E.2d at 132.

6. *Id.*

7. *Id.* at 133.

8. *See id.* at 134 n.1.

9. *Id.* at 136.

10. *Id.*

11. *Allgood v. Meridian Sec. Ins. Co.*, 812 N.E.2d 1065, 1065 (Ind. Ct. App. 2004).

12. *Id.*

13. *Id.*

14. *Id.* at 1065-66.

15. *Id.* at 1066.

16. *Id.*

17. *Id.*

18. 810 N.E.2d 739 (Ind. Ct. App. 2004).

for repaired vehicles was a recoverable element of damages under the uninsured motorist coverage in a policy. The insured's vehicle was repaired after being involved in an accident with an uninsured motorist.¹⁹ The insured alleged that the policy language, identical to the language of the policy in *Allgood*,²⁰ provided coverage for the diminished value of the vehicle following repairs.²¹

The *Dunn* court relied upon the ruling in *Allgood* to find that diminution in value was a recoverable loss under an uninsured motorist policy.²² Consequently, the court reversed the trial court's dismissal of the insured's action.²³

As a result of these cases, insureds may seek to recover for the diminished value of their vehicle following repairs. However, insurance companies will probably add an exclusion to the policy which will eliminate the coverage, or raise rates to reflect the increased risk of damages.

B. "Willful Conduct" Is Not Automatically "Intentional" Conduct for Insurance Policy Construction

The case of *Integon v. Singleton*²⁴ presented an interesting question of whether an insurer must defend its insured against allegations of willful and wanton misconduct. The wife of an insured sustained personal injuries after an accident while she was a passenger on a motorcycle being operated by the insured.²⁵ The wife filed a lawsuit against her husband, and alleged that his conduct was willful and wanton, as opposed to negligent, in causing the accident. She made this allegation to avoid the lawsuit's prohibition under Indiana's Guest Statute.²⁶

The sole basis of the wife's complaint against her husband was for "willful and wanton" conduct. Consequently, the liability insurer for the husband contended that no coverage was owed because the husband's conduct was "intentional" rather than "accidental."²⁷ The insurer argued that "intentional" conduct did not trigger coverage under the insuring agreement,²⁸ and was also

19. *Id.* at 740.

20. Compare *id.* with *Allgood v. Meridian Ins. Co.*, 807 N.E.2d 131, 132 (Ind. Ct. App. 2004).

21. *Dunn*, 810 N.E.2d at 740.

22. *Id.* at 741.

23. *Id.*

24. 795 N.E.2d 511 (Ind. Ct. App. 2003).

25. *Id.* at 512.

26. *Id.* at 515. Indiana's Guest Statute establishes that operators of motor vehicles are not liable for their operation of the vehicle that results in injuries to certain, specified classes including spouses. IND. CODE § 34-30-11-1 (2004).

27. *Integon*, 795 N.E.2d at 514.

28. *Id.* The policy indicated the insurer would provide coverage as follows: "**We will pay damages**, except punitive or exemplary damages, for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an **auto accident**." *Id.* at 512. It defined "accident" to mean "a sudden, unexpected, and unintended occurrence." *Id.*

excluded under a different provision.²⁹ The insurer brought a declaratory judgment lawsuit, and eventually asked the court to grant it summary judgment. The trial court denied the summary judgment request, prompting an appeal by the insurer.³⁰

The court of appeals rejected the insurer's contention that willful and wanton misconduct was the same as intentional conduct.³¹ While the court did not foreclose the possibility that willful and wanton misconduct may also be intentional, the court refused to find, as a matter of law, that the two types of conduct were synonymous.³² Instead, the insurer must present evidence showing the intentions of the insured to cause the damage in order to disclaim coverage.

This decision appears to be a sound one concerning intentional conduct of an insured. Many policies also exclude coverage for damages "expected" by the insured, which has a lesser standard.³³ An insurer may be more successful in arguing that willful and wanton misconduct is synonymous with expected conduct. This decision did not address those standards.

C. A Driver with a Suspended License Did Not Have Permissive Use to Drive Even Though He Was Attempting to Escape a Knife-Wielding Attacker

The facts of *Mroz v. Indiana Insurance Co.*³⁴ present an interesting coverage question. The named insured allowed his teenage son to drive a van to and from school and work.³⁵ However, due to excessive school absences, the son's license was suspended by the Bureau of Motor Vehicles. Nevertheless, the father still allowed the son to drive, but required the son to obtain permission from the father on each occasion. The father and son knew that it was illegal for the son to drive on the suspended license.³⁶

One evening the father gave a family friend permission to drive the van to take the son bowling. The father told the son that he did not have permission to drive that evening. As the group attempted to depart the bowling alley, the family friend engaged in a violent confrontation with another person who threw a baseball bat at the van. The family friend stopped the van, and exited the van

29. The exclusion stated that no coverage was provided for "[b]odily injury or property damage caused intentionally by or at the direction of an insured." *Id.*

30. *Id.* at 513.

31. *Id.* at 516. *See also* Nat'l Mut. Ins. Co. v. Eward, 517 N.E.2d 95, 101 (Ind. Ct. App. 1987) (intoxicated driver's actions may have been "willful and wanton," but were not established by the evidence as "intentional").

32. *Id.*

33. "Expected" injury which is excluded under a liability policy focuses upon when the insured is consciously aware that injury is practically certain to occur. *See* Bolin v. State Farm Fire and Cas. Co., 557 N.E.2d 1084, 1086 (Ind. Ct. App. 1990).

34. 796 N.E.2d 830 (Ind. Ct. App. 2003).

35. *Id.* at 831.

36. *Id.*

to chase the perpetrator.³⁷

As the son waited in the van, another individual approached the son with a knife raised above his head in a threatening gesture. Fearing the attacker, the son jumped into the driver's seat, and drove the van to get away. However, the van's brakes failed, and the son struck and injured a pedestrian.³⁸

The insurer for the van filed a complaint for declaratory judgment, arguing that no liability insurance coverage existed because of an exclusion for any insured "[u]sing a vehicle without a reasonable belief that that 'insured' is entitled to do so."³⁹ In response, the son argued that he had a reasonable belief he was entitled to use the van under the circumstances where he was attempting to escape his attacker.⁴⁰

The trial court granted summary judgment to the insurer.⁴¹ This decision was affirmed on appeal.⁴² The court acknowledged supreme court precedent outlining a five part test to determine a driver's "reasonable belief" of entitlement to operate an automobile:

- (1) whether the driver has the express permission to use the vehicle; (2) whether the driver's use of the vehicle exceeded the permission granted; (3) whether the driver was legally entitled to drive under the laws of the applicable state; (4) whether the driver had any ownership or possessory right to the vehicle; and (5) whether there was some form of relationship between the driver and the insured, or one authorized to act on behalf of the insured, that would have caused the driver to believe that she was entitled to drive.⁴³

The appellate court concluded that the son did not have a reasonable belief to operate the car because his license was suspended, and he was not entitled to drive under the laws of Indiana.⁴⁴ The court also rejected an "extreme emergency" defense⁴⁵ offered by the son in his effort to escape the attacker.⁴⁶

The courts appear to be strictly construing the facts to determine whether a driver has a reasonable belief to operate the car. In assessing these situations, the courts rejected self-defense and intoxication of the owner as justifiable excuses

37. *Id.*

38. *Id.* at 831-32.

39. *Id.* at 832 (alteration in original).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 833 (quoting *Smith v. Cincinnati Ins. Co.*, 790 N.E.2d 460, 461 (Ind. 2003)). The *Smith* court indicated that a driver with only a learner's permit, who drove a car because of the owner's intoxication, did not have a reasonable belief to operate the car. *Smith*, 790 N.E.2d at 462.

44. *Mroz*, 796 N.E.2d at 833.

45. *Id.* The son relied upon Indiana Code section 9-30-10-18, which suggests that *in a criminal action*, a driver's actions may be excused if done to save life or limb in an emergency. IND. CODE § 9-30-10-18 (2004).

46. *Mroz*, 796 N.E.2d at 834.

for drivers without licenses to drive and expect to be afforded insurance coverage.⁴⁷

D. Uninsured Motorist Coverage Is Not Available, Even if Driver Is Uninsured, if There Is Insurance Coverage for the Vehicle

The case of *Greenfield v. Allstate Personal Property and Casualty*⁴⁸ presented an interesting policy interpretation on the availability of uninsured motorist coverage. In supplying her daughter with an automobile, a mother gave clear instructions that no one, other than the daughter, was to drive the vehicle.⁴⁹ The daughter allowed another individual to drive the vehicle, and an accident occurred resulting in the death of the daughter. The driver was uninsured at the time of the accident.⁵⁰

The daughter's estate sought uninsured motorist coverage from the mother's policy. The insurer argued that no coverage was available because the vehicle involved was not an "uninsured auto."⁵¹ While the driver was uninsured, the vehicle in which the daughter was riding, was insured.⁵²

Both the trial court and the court of appeals agreed with the interpretation offered by the insurer and affirmed the summary judgment in favor of the insurer.⁵³ The court relied upon earlier decisions where an insured sought to assert a claim for incidents involving his own vehicle and uninsured drivers.⁵⁴

The court also rejected the suggestion that the insurer's policy violated the public policy of Indiana's Uninsured Motorist Statute.⁵⁵ However, the court observed that Indiana's legislature had not addressed the earlier court decisions on this issue.⁵⁶ Because the statute had been amended a number of times, without any provisions which disapproved the earlier court decisions, the court concluded

47. *Smith*, 790 N.E.2d at 462; *Mroz*, 796 N.E.2d at 834.

48. 806 N.E.2d 856 (Ind. Ct. App. 2004).

49. *Id.* at 857.

50. *Id.*

51. *See id.* at 857-58. The policy noted that coverage was owed for damages that the insured is "entitled to recover from the owner or operator of an *uninsured auto.*" *Id.* at 858 (emphasis added). It further defined "uninsured auto" as "a motor vehicle which has no bodily injury or property damage liability bond or insurance policy in effect at the time of the accident." *Id.* The policy further stated that an uninsured auto is not "a motor vehicle which is insured under . . . this policy." *Id.*

52. *Id.*

53. *Id.* at 861.

54. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 635 N.E.2d 200 (Ind. Ct. App. 1994) (insured was passenger of own vehicle that was operated by underinsured motorist); *Whitledge v. Jordan*, 586 N.E.2d 884 (Ind. Ct. App. 1992) (uninsured thief who was stealing a car injured the insured who was trying to prevent theft).

55. IND. CODE § 27-7-5-2 (2003).

56. *Greenfield*, 806 N.E.2d at 860.

that the legislature tacitly approved the court's earlier rulings.⁵⁷

E. Newly Acquired Vehicle Qualified for Coverage Under Personal Auto Policy Even Though Vehicle Was Purchased for Unstarted Business

The case of *American Family Mutual Insurance Co. v. Ginther*⁵⁸ contains a number of interesting issues applicable to insurance practitioners. The insured purchased a truck which he intended to eventually use for a construction business that he had not yet started. On his way home after completing the purchase, the insured was involved in an automobile accident with other motorists who sustained personal injuries.⁵⁹ At the time of the accident, the insured possessed a personal automobile policy with American Family on his only other operable vehicle.⁶⁰

Two days later, the insured's wife visited their insurance agency requesting insurance coverage on the new truck. The insured advised that the new truck was to be used in his commercial business that had not been started. With respect to the accident, the agent notified the insured that because the new truck was to be used for a commercial business, there was no coverage to the insured under the personal liability policy.⁶¹

The insured filed a declaratory judgment action against American Family, but not against the injured motorists, to determine whether the new truck satisfied the "newly acquired vehicle" portion of the policy.⁶² However, after the insured's counsel withdrew, the insured and American Family executed a stipulation of dismissal, with prejudice, of the declaratory judgment action.

The injured motorists submitted claims to their uninsured motorist carrier, Safeco. Eventually, Safeco and the injured motorists settled the uninsured motorists claims. A second lawsuit was filed by the injured motorists on behalf of Safeco to recover from the insured for the amounts paid by Safeco.⁶³ A default judgment was obtained against the insured, and proceedings supplemental

57. *Id.* at 861.

58. 803 N.E.2d 224 (Ind. Ct. App. 2004).

59. *Id.* at 226.

60. *Id.*

61. *Id.*

62. The policy provided that "your insured car" meant

[a]ny additional private passenger car or utility car of which you acquire ownership during the policy period, provided:

(1) If it is a private passenger car, we insure all of your other private passenger cars; or

(2) If it is a utility car, we insure all of your other private passenger cars and utility cars.

You must tell us within 30 days of its acquisition that you want us to insure the additional car.

Id. at 232.

63. *Id.* at 228.

to collect on the judgment were pursued against American Family.⁶⁴

American Family pursued a number of legal attacks on the action, by filing multiple dispositive motions which were denied; appellate proceedings were also pursued. First, American Family argued that the injured motorists were collaterally estopped from bringing the action because of the earlier litigation between the insured and American Family.⁶⁵ American Family suggested that the injured motorists failed to intervene in the proceedings, and were therefore bound by the outcome. However, the appellate court rejected that argument by noting that because the injured motorists were not parties to the earlier declaratory judgment action, they were not bound by the ruling.⁶⁶ The court further observed that the party bringing the declaratory judgment action must include all affected parties in order to have a binding effect.⁶⁷

The court also affirmed the trial court's conclusion that coverage for the new truck existed under the American Family policy because it was a newly acquired vehicle. American Family argued that because the new truck was purchased for the insured to use in a commercial business, no coverage existed. The court rejected this contention as well by observing that because the business was not in operation at the time of the accident, the truck was a personal auto that satisfied the definition of a newly acquired vehicle.⁶⁸

The final legal issue focused upon whether the injured motorists were judicially estopped from arguing that American Family owed coverage because they sought and received uninsured motorist coverage.⁶⁹ The court rejected this argument as well for a number of reasons. The most significant reason was based upon the fact that when American Family denied coverage to the insured, the injured motorists qualified to seek uninsured motorist coverage under the Safeco policy.⁷⁰

F. An Insured's Accident with Uninsured and Underinsured Motorists Did Not Permit a Claim for the Policy Limits of Each Coverage

In *Imre v. Lake States Insurance Co.*,⁷¹ the insured was a passenger on an all-terrain vehicle ("ATV"). As the operator of the ATV suddenly turned left, the ATV was struck by a car that was attempting to pass in a no-passing zone. As

64. *Id.* at 229.

65. *Id.* at 230.

66. *Id.* at 230-31.

67. *Id.* The court specifically looked to Indiana Code section 34-14-1-11 which provides in pertinent part, that for declaratory judgment actions, "all persons shall be made parties who have or claim any interest that will be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." IND. CODE § 34-14-1-11 (2004).

68. *Ginther*, 803 N.E.2d at 233.

69. *Id.* at 235.

70. *Id.*

71. 803 N.E.2d 1126 (Ind. Ct. App. 2004).

a result of the accident, the insured sustained serious personal injuries.⁷²

The insured possessed a policy that provided uninsured and underinsured motorist coverage of \$100,000.⁷³ The operator of the ATV was uninsured. The driver of the car possessed liability limits of \$50,000, which were paid to the insured. The insured made an unusual request to its insurer contending that, because there was both an uninsured and underinsured motorist, \$100,000 of policy limits applied to each claim for a total of \$200,000.⁷⁴

The insurer countered that only \$100,000 of coverage was available for all claims, and that it was entitled to a setoff for the \$50,000 paid by the underinsured motorist.⁷⁵ The trial court agreed, and granted summary judgment to the insurer. On appeal, the court agreed with the insurer and found that no reasonable policyholder would expect to have coverage of \$200,000, instead of \$100,000.⁷⁶ Furthermore, the court concluded that the insurer was entitled to a setoff for the \$50,000 paid by the driver of the vehicle.⁷⁷

G. Uninsured Motorist Coverage Under Personal Policy Was Not Available to Police Officer Injured While Riding Motorcycle

The facts and ultimate conclusion in *Jackson v. Jones*⁷⁸ provide an excellent reminder of why insureds may wish to periodically review the extent of coverages available to them. The insured was a motorcycle police officer who was involved in an accident with an uninsured motorist. The municipality that employed the police officer did not offer uninsured motorist coverage on the motorcycle involved in the accident, and the police officer sought coverage from his own personal insurance policy.⁷⁹ The personal insurer denied coverage by relying upon policy language that excluded uninsured motorist coverage for incidents involving the use of vehicles, not identified in the policy, which were available for the regular use of the insured.⁸⁰ The parties agreed that the motorcycle involved in the accident was provided for the regular use of the police

72. *Id.* at 1128.

73. *Id.*

74. *Id.*

75. *Id.* at 1129.

76. *Id.* at 1131.

77. *Id.* Specifically, the applicable language provided that the insurer would “not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.” *Id.*

78. 804 N.E.2d 155 (Ind. Ct. App. 2004).

79. *Id.*

80. The exact language provided:

It is agreed that the following exclusion is added to the Exclusions under part II of your policy. *Uninsured Motorist coverage . . . does not apply to damages arising out of the ownership, maintenance, or use of any vehicle other than your insured car . . . , which is owned by or furnished or available for the regular use by you or a family member.*

Id. at 159.

officer. The police officer argued that such an exclusion violated Indiana's public policy as outlined under the Uninsured Motorist Statute.⁸¹

The trial court and appellate court rejected the police officer's contention. The appellate court concluded that as long as the liability coverage afforded under the policy includes the same exclusion at issue in the uninsured motorist coverage section, then public policy is not violated.⁸²

As many insureds utilize vehicles supplied by their employers, they should check the available coverages under the employer's and their personal policies. As existed in this case, the police officer lacked any uninsured motorist coverage to compensate for his personal injuries when he was using an employer's motorcycle. To avoid this uninsured risk, insureds should perform a comparison of the available coverages.

H. An Uninsured Motorist Claim Is a Breach of Contract Action Where Damages Are Determined upon Tort Principles

In *Malott v. State Farm Mutual Automobile Insurance Co.*,⁸³ the insured and insurer disagreed on the value of the insured's uninsured motorist claim. The insurer paid the medical bills submitted by the insured, but contended that the insured was entitled to no additional compensation.⁸⁴ The case proceeded to trial where the jury was instructed that, in order to find in favor of the insured, it must conclude the insurer breached the policy and that damages were limited to the limits of coverage available under the policy.⁸⁵ The jury also was instructed on the manner of calculating the insured's damages that would be available under a tort theory. The jury concluded that the insurer was only entitled to an additional \$14,000 in damages, and the insured appealed, contending that the jury was improperly instructed.⁸⁶

On appeal, the jury's verdict was affirmed.⁸⁷ The court enunciated the manner in which a uninsured motorist claim is to be assessed by the trier of fact as follows:

Thus, as with all [uninsured motorist] insurance recovery cases, this case was a hybrid between a contract case and a tort case. Technically, it was an action to recover for a breach of contract, but in order to do so, [the insured] was required to demonstrate [the uninsured motorist's] negligence and a causal link from the accident to her claimed damages and that those damages exceeded the amount [the insurer] had already paid. . . . In other words, in the present case the jury was required first to assess the damages [the insured] suffered in the accident in

81. IND. CODE § 27-7-5-2 (2003).

82. *Jackson*, 804 N.E.2d at 161.

83. 798 N.E.2d 924 (Ind. Ct. App. 2004).

84. *Id.* at 925.

85. *Id.* The policy limits were \$100,000.

86. *Id.* at 926.

87. *Id.* at 927.

accordance with tort law principles, and then it was required to compare this amount with the amount [the insurer] had actually paid and determine, under contract law principles, whether [the insurer] breached its contractual obligation to pay [uninsured motorist] benefits.⁸⁸

The court also concluded that the jury was properly instructed that the damages for the breach of contract claim could not exceed the insured's policy limits.⁸⁹ Because no claim for bad faith was filed by the insured, the extent of damages available was the policy limits.⁹⁰

I. Chiropractor Entitled to Enforce Assignment of Proceeds Against Negligent Driver's Liability Insurer

In *Midtown Chiropractic v. Illinois Farmers Insurance Co.*,⁹¹ a decision of first impression in Indiana, the Indiana Court of Appeals recognized as valid an assignment by a patient to a chiropractor of proceeds for any recovery from negligent parties arising from an auto accident. The court also allowed the chiropractor to enforce the assignment by bringing an action directly against the negligent party's insurer.⁹²

The patient was injured in an auto accident and sought chiropractic treatment.⁹³ In obtaining the chiropractic treatment, the patient executed an assignment of benefits or proceeds he may receive from a settlement or verdict from any responsible party for the accident. The patient and the insurer for the other party involved in the accident reached a settlement, but the settlement draft did not include the chiropractor, and the patient did not pay the chiropractor. After the patient executed a release of all claims against the other driver, the chiropractor brought a lawsuit against the driver's insurer, but not the driver, to recover for providing services rendered.⁹⁴

The insurer initially contended that the assignment was improper as an attempt to assign the patient's personal injury claim.⁹⁵ The appellate court agreed that personal injury claims remain unassignable,⁹⁶ but the court determined that the patient's assignment was confined to proceeds and not the patient's entire cause of action.⁹⁷ The court stated that allowing a patient to assign proceeds to the chiropractor relieved the patient from having a financial burden before a settlement is reached.⁹⁸

88. *Id.* at 926 (internal citations omitted).

89. *Id.* at 927.

90. *Id.*

91. 812 N.E.2d 851 (Ind. Ct. App. 2004), *petition for trans. pending*.

92. *Id.* at 857.

93. *Id.* at 853.

94. *Id.*

95. *Id.*

96. *See Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482 (Ind. Ct. App. 1998).

97. *Midtown Chiropractic*, 812 N.E.2d at 854.

98. *Id.* at 854-55.

The insurer also argued that even if the assignment was valid, the chiropractor could not bring an action against the other driver's insurance company to recover the amounts.⁹⁹ The appellate court concluded that if a liability insurer for a negligent driver fails to pay the chiropractor holding the assignment, the chiropractor then may bring a direct action against the insurer to enforce the assignment.¹⁰⁰ The court's recognition of a chiropractor's right to bring a direct action against the insurer of an alleged tortfeasor appears to be in direct conflict with law that prohibits such actions.¹⁰¹ Furthermore, this case could lead plaintiffs of personal injury claims to assign their right to proceeds to any creditor, with the result that the creditor may enforce the assignment against an insurer, even if the insurer lacks any knowledge of the creditor's rights when a settlement is reached with the injured plaintiff.

II. COMMERCIAL POLICIES

A. If Policy Requires a Party to Have a Written Contract to Be an Additional Insured, Then an Oral Contract Is Insufficient

In construction projects, the allocation of risks for injuries to persons working at the site is often litigated. The decision of *Liberty Insurance Corp. v. Ferguson Steel Co.*¹⁰² focused on efforts to include a party as an additional insured to another's policy. Pursuant to an informal, oral agreement between the subcontractor and the general contractor to perform work and to name the general contractor as an insured on the subcontractor's policy, the subcontractor started working at the construction site.¹⁰³ One of the subcontractor's employees sustained injuries from an accident and brought a lawsuit against the general contractor.¹⁰⁴

Shortly after the accident, the general contractor and the subcontractor entered into a written contract which included a provision requiring the subcontractor to purchase and maintain liability insurance that included the general contractor as an additional insured. The contract also incorporated all prior negotiations between the parties.¹⁰⁵

As a result of the injured employee's lawsuit, the general contractor sought insurance under the subcontractor's policy. The insurer denied coverage because the additional insured endorsement required that the named insured and the proposed additional insured must have "agreed in writing in a contract or agreement that such person or organization [will] be added as an additional

99. *Id.* at 856.

100. *Id.* at 857.

101. *See* *Winchell v. Aetna Life and Cas. Ins. Co.*, 394 N.E.2d 1114 (Ind. App. 1979).

102. 812 N.E.2d 228 (Ind. Ct. App. 2004).

103. *See id.* at 229-30.

104. *Id.*

105. *Id.* at 230.

insured on your policy.”¹⁰⁶ Because there was no written contract calling for the general contractor to be included as an additional insured on the subcontractor’s policy, the insurer argued that no coverage was owed.¹⁰⁷

The court of appeals agreed with the insurer, and reversed the trial court’s grant of summary judgment to the general contractor. The court rejected the general contractor’s arguments that the endorsement did not require the written contract to exist before the work began or the accident occurred, and that the execution of the contract after the work began was a common course of dealing between the parties.¹⁰⁸ The court found that the insurer was only bound to insure parties based on the written contracts in existence at the time of the accident, and that because the insurer was not part of the “course of dealing” between the contractor and subcontractor, it lacked knowledge of those dealings to be bound by them.¹⁰⁹

B. With Respect to a Lost Policy, the Insured Bears the Burden to Demonstrate the Coverage Available

The decision of *PSI Energy, Inc. v. Home Insurance Co.*¹¹⁰ focused upon a number of issues in a complex environmental lawsuit. However, the court addressed one matter of first impression: what an insured is required to demonstrate to obtain coverage when the insurance policy cannot be located.

The insured was a utility company that operated a number of gas manufacturing facilities from the mid-1800s to 1950.¹¹¹ As a result of the manufacturing process during the utility’s ownership, groundwater was contaminated from by-products resulting in a need for costly remediation. The utility sought insurance coverage for environmental claims from various insurers who provided policies to the utility during that time frame.¹¹² Unfortunately, neither the utility nor the insurers could locate actual or exemplar copies of certain excess policies that were in place at the time of loss to determine the scope of coverage that may be available.¹¹³

After a declaratory judgment action was brought to establish coverage, the

106. *Id.* at 229. The exact language identified an insured as [a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured.

Id. at 229.

107. *Id.* at 230.

108. *Id.* at 231.

109. *Id.*

110. 801 N.E.2d 705 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 85 (Ind. 2004).

111. *Id.* at 710-11.

112. *Id.* at 711.

113. *See id.*

insurers sought summary judgment by contending that the utility failed to present evidence of the coverages provided to them because the policies were unavailable.¹¹⁴ The utility presented various records to show the existence of the policies, and also a report and deposition testimony of an insurance expert who attempted to establish the terms of coverage by reference to other policies. While the expert was able to offer testimony of what he believed the scope of coverage to be under the missing policies, he also admitted an inability to describe the coverages with any degree of certainty.¹¹⁵

The trial court granted summary judgment to the insurers, and determined that the evidence was insufficient for the trier of fact to determine what coverage existed.¹¹⁶ The court of appeals reversed the trial court, and concluded that a question of fact existed.¹¹⁷ The court found it most significant that the policies at issue were excess policies, and the terms and conditions of the excess policies were most likely the same as the primary policies, which were part of the appellate record. The court placed the burden to prove the substance of coverage on the utility company, such that the trier of fact could still determine that the utility company did not present sufficient evidence.¹¹⁸

III. HOMEOWNER'S LIABILITY POLICY

A. Coverage Under a Farmer's Liability Policy Was Not Available for Claims of Injured Farm Worker, Struck by a Truck While on the Farm

In most circumstances, a homeowner's policy will explicitly exclude liability coverage for claims arising from motor vehicle accidents. In *Westfield Cos. v. Knapp*,¹¹⁹ the exclusion was addressed in the context of a farm liability policy when a farm worker was struck by a truck while employed at the farm. The liability insurer filed a declaratory judgment claiming, in part,¹²⁰ that no liability coverage was available to the farm because of application of the "motor vehicle" exclusion.¹²¹

The injured worker apparently conceded that he was struck by a "motor vehicle," which made the exclusion applicable, but contended that an exception

114. *Id.*

115. *Id.* at 721.

116. *Id.* at 710.

117. *Id.* at 722.

118. *Id.* Another important holding from this decision was that a continual release of contaminants into the ground water during each policy period triggered each policy that was affected. *Id.* at 738.

119. 804 N.E.2d 1270 (Ind. Ct. App. 2004).

120. Another issue addressed was whether medical payments coverage was available to the injured worker. *Id.* at 1272.

121. *Id.* That policy provision excluded coverage for any bodily injury arising out of the "maintenance, use, operation, or 'loading or unloading' of any 'motor vehicle' . . . by any 'insured.'" *Id.* at 1274.

to the definition of “motor vehicle” applied to afford coverage.¹²² Specifically, the exception applied to “mobile equipment,” which included “vehicles while used on premises [the insured] own[ed] or rent[ed].”¹²³ Thus, the injured worker contended that because he was struck by a “vehicle” which was undefined within the policy, it satisfied the definition of “mobile equipment” and should be excepted from the policy exclusion.¹²⁴

The trial court agreed with the injured worker and granted summary judgment finding coverage.¹²⁵ However, the court of appeals reversed the trial court, finding the evidence designated showed that the truck was a “motor vehicle.”¹²⁶ The court observed that the truck was “registered, insured, designed for and licensed for use on public roads” such that it satisfied the exclusion, but not the exception.¹²⁷

A similar question was also addressed in *Illinois Farmers Insurance Co. v. Wiegand*.¹²⁸ A young girl visiting the insured’s daughter was severely injured when involved in an accident while operating the insured’s ATV.¹²⁹ The injured girl filed a lawsuit against the daughter’s parents alleging that they were liable for negligently entrusting the ATV to the girl.¹³⁰ The parents sought liability coverage under their homeowners policy. That insurer argued that coverage was excluded because the injuries to the girl occurred from the use and entrustment¹³¹ of a “motor vehicle.”¹³² The parents argued that coverage existed because the ATV fit within an exception to the definition of “motor vehicle” as a

122. *Id.* at 1274-75.
123. *Id.* at 1275.
124. *Id.*
125. *Id.* at 1273.
126. *Id.* at 1276.
127. *Id.*
128. 808 N.E.2d 180 (Ind. Ct. App. 2004).
129. *Id.* at 182.
130. *Id.*
131. The exclusions provided that no coverage was available when the claim
7. results from the ownership, maintenance, use, loading or unloading of: . . .
b. **motor vehicles**.
8. results from the entrustment of . . . **motor vehicles**. . . . Entrustment means the permission you give to any **person** other than you to use any . . . motor vehicles . . . owned or controlled by you.
Id. at 183.
132. “Motor vehicle” was defined, in pertinent part, as:
a. a motorized land vehicle, including a trailer, semi-trailer or motorized bicycle, designed for travel on public roads. . . .
c. Any other motorized land vehicle designed for recreational use off public roads. None of the following is [sic] a **motor vehicle**. . . .
b. A motorized land vehicle, not subject to **motor vehicle** registration, used only on an **insured location**.
Id.

nonregistered vehicle used only on the named insured's premises.¹³³

The trial court granted summary judgment to the insurer in finding that the ATV was a "motor vehicle" as defined by the policy, and that it was not excepted from the definition.¹³⁴ The court denied the insurer's request for summary judgment concerning coverage for the negligent entrustment claim.¹³⁵

On appeal, the court of appeals addressed each of the trial court's conclusions. As to the determination that the ATV was a "motor vehicle," the court observed that this question was one of first impression in Indiana.¹³⁶ Relying upon decisions from other jurisdictions that addressed this issue,¹³⁷ the court concluded that the ATV was a recreational vehicle designed for use off of public roads.¹³⁸ The court also found that the exception to the definition of "motor vehicle" did not apply, because the ATV was used at the time of the accident and on other occasions away from the "insured location."¹³⁹ As a result, the homeowner's policy did not apply.

The court also reviewed the trial court's decision that coverage was afforded for the negligent entrustment claim against the parents. The court concluded that because the girl's injuries were caused from the "immediate and efficient" use of the ATV, no coverage was afforded.¹⁴⁰ The court summarized its position by stating "a negligent supervision claim, like the one here, is excluded from coverage where the injury would not have resulted but for the use of the motor vehicle."¹⁴¹ Because the policy at issue was a homeowner's policy, no coverage was afforded for an accident that arose solely out of the use of a motor vehicle, even for a negligent entrustment claim.

*B. Accident Occurring on Public Road, Was Not Within Insured
"Premises" to be Afforded Liability Coverage*

In *Indiana Insurance Co. v. Dreiman*,¹⁴² two brothers owned adjoining farms that were separated by a public road. One of the brothers had a farm liability policy for his farm, and also identified the other brother as an additional insured and his farm as a "designated premises."¹⁴³ The grandson of the named insured was operating a motor bike with a passenger for recreation. As the grandson was driving on the public road separating the properties, he was involved in an

133. *Id.* at 182.

134. *Id.* at 183.

135. *Id.* at 184.

136. *Id.* at 187.

137. *Farm Family Mut. Ins. Co. v. Whelpley*, 767 N.E.2d 1101 (Mass. App. Ct. 2002); *DeWitt v. Nationwide Mut. Fire Ins. Co.*, 672 N.E.2d 1104 (Ohio Ct. App. 1996).

138. *Wiegand*, 808 N.E.2d at 187.

139. *Id.*

140. *Id.* at 190.

141. *Id.* at 191.

142. 804 N.E.2d 815 (Ind. Ct. App. 2004).

143. *Id.* at 817.

accident that injured the passenger. The passenger brought a lawsuit against the named insureds and the grandson for negligence.¹⁴⁴

The named insureds sought coverage under the liability policy. While the policy generally excluded coverage for accidents involving a “motor vehicle,” it did provide coverage for injuries involving a motor vehicle if “use[d] exclusively at the ‘insured location.’”¹⁴⁵ The named insureds contended, and the trial court agreed, that the county road was a part of the “insured location”¹⁴⁶ under the policy because it divided the two insured property locations and was used by the named and additional insureds for their farming operations.¹⁴⁷

The court of appeals disagreed with the trial court and reversed the summary judgment order that found the existence of coverage.¹⁴⁸ The court focused upon the meaning of “premises.”¹⁴⁹ The court found this term to be unambiguous and that it did not include a public roadway.¹⁵⁰ Even though use of the road may have been part of the farming operations, the court found that because the insureds lacked any control over the county road, the road cannot be considered part of the insured’s property for coverage purposes.¹⁵¹

C. A Minor’s Sexual Molestation of Another Did Present an “Occurrence” to Trigger Coverage Under a Homeowner’s Policy

Indiana law has clearly established that no insurance coverage is available to an adult sexual molester.¹⁵² In *State Farm Fire and Casualty Co. v. C.F.*,¹⁵³ the court addressed and concluded that liability insurance coverage is also unavailable when the molester is a minor.

A twelve-year-old insured molested a six-year-old victim. The insured admitted in juvenile criminal proceedings to committing the acts.¹⁵⁴ The victim and her parents filed a lawsuit against the perpetrator and his parents.¹⁵⁵ The homeowner’s insurer for the parents and perpetrator provided a defense under a reservation of rights. The victim filed a declaratory judgment contending that the victim’s alleged injuries did not arise from an “occurrence” as the actions were

144. *Id.*

145. *Id.* at 818.

146. The “insured location” was defined in the policy as “(a) The farm premises (including grounds and private approaches) and ‘residence premises’ shown in the Declarations. . . . [and] (c) Premises used by you *in conjunction with* the [farm and residence] premises.” *Id.* at 819.

147. *Id.*

148. *Id.* at 816.

149. *Id.* at 820.

150. *Id.* at 821.

151. *Id.*

152. *Wiseman v. Leming*, 574 N.E.2d 327 (Ind. Ct. App. 1991).

153. 812 N.E.2d 181 (Ind. Ct. App. 2004).

154. *Id.*

155. *Id.* at 183.

intentional rather than accidental.¹⁵⁶ The victim argued that her injuries arose from an "occurrence" because the perpetrator was not able to form the necessary intent for his actions to be considered anything other than accidental.¹⁵⁷ In other words, the victim argued that intent could not be inferred from the molester's admissions, because a juvenile could not form the mens rea or necessary mental element of a crime.

The appellate court concluded that no "occurrence" existed, and reversed the trial court's denial of summary judgment to the insurer.¹⁵⁸ The court found that a juvenile is treated differently in juvenile court proceedings, because of the juvenile's lack of maturity and unique circumstances.¹⁵⁹ The court rejected the argument that minors cannot form the necessary mental element of a crime by observing that, if that was true, no minor could ever commit a crime because the mental element is part of the crime.¹⁶⁰ Thus, the perpetrator's admissions established that his conduct was not accidental and therefore did not constitute an "occurrence," and that no liability coverage was available.¹⁶¹

156. *Id.* "Occurrence" was defined by the policy as "**an accident, including exposure to conditions**, which results in: a. **bodily injury**; or b. **property damage**; during the policy period." *Id.*

157. *Id.* at 184.

158. *Id.*

159. *Id.* at 184-85.

160. *Id.* at 185.

161. *Id.*

RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

Several notable developments in intellectual property law, and particularly in the law of patents, occurred during the survey period (October 1, 2003 through September 30, 2004). New regulations affecting the appeal process for patent applications, the appeal process concerning re-examined patents, and the patent interference process were promulgated effective September 14, 2004. Practitioners and businesses who are looking to procure and maintain patents, particularly those in crowded or quickly-developing fields, should be aware that the U.S. Patent and Trademark Office has placed significant new responsibilities on parties to appeals and interferences. Earlier in the year, the Federal Circuit issued an opinion not only calling into question both recent and long-standing precedent relating to patent claim construction, but also calling for assistance from the patent bar as it decides whether to retain old standards, formulate new rules, or require a combination of both. In another opinion, the Federal Circuit overruled established rules regarding presumptions arising from unproduced opinions of counsel. In short, whether one is applying for a patent, contesting an application, considering the scope or validity of a patent, or litigating a patent, there are new rules to be observed.

I. REVISIONS AND RESTRUCTURING OF PATENT REGULATIONS ON APPEAL AND INTERFERENCE

As part of its rulemaking during the survey period, the United States Patent and Trademark Office ("PTO") enacted substantial additions to its rules, which concern the procedure and administration of cases before PTO's Board of Patent Appeals and Interferences.¹ The new rules are set forth in a new Part 41 to Title 37 of the Code of Federal Regulations.

For those unfamiliar with the PTO Board of Patent Appeals and Interferences (the "Board") and proceedings before it, some background will be necessary. As its name suggests, the Board handles appeals of final rejections made by patent examiners in original prosecution of patent applications, as well as in reexamination or reissue proceedings. It also handles priority of invention contests known as interferences. With the recent advent of contested patent reexamination, the Board also handles appeals from those proceedings. A brief review of each type of case follows.

An *ex parte* appeal to the Board may be taken from an examiner's final rejection of one or more claims in a patent application. Following the filing of a patent application, the patent examiner reviews its claims, and rejects those that he or she believes do not meet the requirements of the patent laws. The applicant has an opportunity to contest such rejections with amendments and arguments,

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1. See Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. 49,960 (Aug. 12, 2004) (codified at 37 C.F.R. §§ 41.1-41.208).

and the examiner then reconsiders the claims originally rejected. A second rejection on the same grounds is generally considered a "final" rejection.

After a final rejection, the applicant has several options, among which are to amend the claims in a way to make them allowable, to file a new application or a request for continued examination of the original application, or to appeal the examiner's final rejection to the Board. An *ex parte* appeal begins by filing a notice of appeal. Once the notice is filed, the appellant has a time period within which to file his or her appeal brief, which presents the issues and the arguments for overturning the examiner's rejection. The brief may rely only on the information of record before the examiner, as a general matter. The examiner may further reconsider the rejection(s) of record and withdraw it, or may prepare and file a response brief. The applicant may file a reply brief, and may request an oral hearing. A three-person panel of the Board considers the briefs and any oral argument, and hands down a decision sustaining or overturning the rejection(s), and/or remanding the case to the examiner for further action. A similar process is provided for appeal in *ex parte* or *inter partes* reexamination or reissue proceedings.

An interference is a proceeding unique to United States patent practice, as it deals with the premise in United States patent law that the first to invent subject matter is entitled to a patent claiming it. "Invention" requires conception, i.e., having a definite mental understanding of a device, method, composition of matter, or product as it is thereafter to be made or used and reduction to practice via a prototype or filing a patent application.² Thus, an interference is the legal proceeding dedicated to making that determination of first invention.

Generally speaking, an interference occurs when one set of inventors has one or more claims in a patent application to the same subject matter as claims in another's application or patent, and those claims are otherwise patentable to both. As one application makes its way through the examination process, its examiner is charged with keeping an eye out for potentially interfering applications or patents, and to make a search for such documents when the application is otherwise allowable. Frequently, interference cases will result from the examiner's familiarity with other applications or patents in his or her area of specialty. The examiner may either reject an applicant's claims over them or suggest that the applicant should add claims that would interfere with another application or patent. Alternatively, an applicant may purposefully include in his or her application claims that are copied from another application (e.g., a published application) or a patent, in the belief that his or her date of invention will be before that of the other application or patent.

Thus, interference can be a matter of coincidence, of patent strategy, or both. It is uncommon but certainly not unheard of for two inventors to have the same idea, and to claim it in a patent application in substantially the same way. The chances of such an occurrence increase where two parties that have been working together on a problem split up, and both decide to claim patent rights on the problem's solution. Interference is a way to have a legal determination made as

2. See, e.g., *Cooper v. Goldfarb*, 154 F.3d 1321, 1327 (Fed. Cir. 1998).

to which of the inventors is entitled to the patent on the given subject matter. In crowded or quickly-developing fields, parties can file patent applications with relatively broad disclosures, and monitor other applications as they are published or are issued as patents. At that time, changes can be made to claims in an existing application to provoke an interference, assuming, of course, that such changes are supported properly by the disclosure. A successful interference at least removes one or more patent claims from one's opponent, and may entitle one to those claims. In other words, it is not only possible that the opponent loses his or her patent claims and the monopoly they represent, but that one can take away the claims for oneself, placing the opponent in the position of either respecting the patent monopoly or obtaining a license. Patent-savvy clients can use interference as a sword, to damage an opponent's patent position, or as a shield, to protect their own development. Patents of direct interest to competitors can be obtained, or competitors' patents can be defeated.

With the rule changes, a new Part 41 in title 37 of the Code of Federal Regulations was proposed and enacted, and sections of Part 1 of that title (including the entirety of the sections, numbered 1.601 through 1.690, dealing with interferences) were removed.³ Part 41 includes five subparts. Subpart A is of general applicability to all proceedings before the Board. Subpart B includes provisions applicable to *ex parte* appeals of claim rejections by patent examiners. Rules regarding appeals in *inter partes* cases, i.e., appeals from one or both parties in an *inter partes* reexamination proceeding, are found in subpart C. Subpart D provides rules applicable to "contested cases," which the comments identify as interferences under 35 U.S.C. § 135, and "Government ownership contests under 42 U.S.C. 2182(3) and 2457(d)."⁴ Finally, subpart E provides additional rules solely for interferences.

It is clear that these revisions and recodification of PTO rules are meant to streamline practice before the Board. The procedural rules concerning each of these diverse proceedings are pulled together into one part of the regulations, and harmonization of terminology and practice among the proceedings are introduced. Features common to all of the proceeding types are dealt with together in subpart A, and issues specific to one type of proceeding are found in another subpart, or in the case of interferences, in two other subparts. Nevertheless, in many situations similar language and treatment are used between the various proceedings even where differences mandate separate sections. It would appear that, as a result, PTO personnel, from administrative patent judges to paralegals to file personnel, will be able quickly and easily to move among and handle different types of cases.

3. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 50,001.

4. *Id.* at 49,967. The "ownership contests" referred to are relatively rare, certainly as compared to the frequency of interferences, and therefore nothing more regarding their substance will be said here. Nonetheless, it is to be borne in mind that the rules of subparts A and D of Part 41 will apply to such contests.

A. Subpart A: General Provisions

Sections 1 through 20 of Part 41 (37 C.F.R. §§ 41.1 to 41.20) form subpart A, and are the most basic ground rules for Board proceedings, covering topics from general policy (37 C.F.R. § 41.1) to fees (37 C.F.R. § 41.20).⁵ Of particular note for practitioners are the sections noted below.

Section 2⁶ provides a variety of definitions applicable to all proceedings under Part 41. The definitions of “Board” and “Board member” are introduced, and they include the Director and Deputy Director of the Patent and Trademark Office and the Commissioners for Patents and Trademarks as well as the administrative patent judges. The comments note that these definitions are intended to track the language defining the Board in the Patent Act.⁷ Thus, it would appear that the definition of “Board member” is a superfluous addition. While academically interesting insofar as it would suggest that such high administrators could sit in judgment in possibly quite significant patent cases, it does not seem likely the those persons will frequently, or perhaps ever, do so.

A definition is also given for the term “contested case,” which is a term new to the rules. The term has the apparently broad definition of “a Board proceeding,” but then carves out three exceptions: (1) an appeal under 35 U.S.C. § 134 (i.e., an *ex parte* appeal of a rejected claim), (2) a petition to the Board, or (3) an appeal in an *inter partes* reexamination⁸ case.⁹ The comments to the rule note that the definition “includes” interferences and “proceedings with interference-based procedures (42 U.S.C. 2182 and 2457(d)).”¹⁰ Nevertheless, the text of the rule does not appear to so limit the definition of “contested case.”

This definition may open the way for other types of “contested cases,” since the rules define that category and leave open the opportunity to fit new proceedings into it. As practitioners will realize, there have been changes recently in prosecution practice, as well as discussions hosted by the PTO, toward or tending to harmonize United States patent practice to a degree with practices of foreign patent offices, particularly the European Patent Office and Japan Patent Office. One such example is the December 2004 change of the patent application fee structure to split the filing fee into separate filing, publication, and examination fees, paralleling the types of fees commonly charged by foreign patent offices. With the definition of “contested case” remaining open, it may be that a European-style opposition practice, in which opponents have the opportunity to challenge an allowed patent application prior to issuance, could be created and easily fit into the definition of “contested case.”

5. 37 C.F.R. §§ 41.1-41.20 (2004).

6. 37 C.F.R. § 41.2.

7. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,961; see 35 U.S.C. § 6 (2000 & Supp. 2002).

8. See discussion of subpart C, *infra* Part I.C.

9. 37 C.F.R. § 41.2.

10. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,961.

While that supposition is speculative, in light of discussions concerning harmonization and concerning ways to increase the assurance that issued patents are valid under the law, the potential for extending this definition to an opposition proceeding or other matters will bear watching.

Another section of note is 37 C.F.R. § 41.4 concerning timeliness.¹¹ The principal points in this section are (1) unless provided for by rule, deadline extensions are available only on a showing of good cause, and (2) late filings will be excused on a showing of excusable neglect or a Board determination that consideration is in the interest of justice. The first of these points has been a standard in interference practice, stated in the Standing Order issued at the beginning of the interference.¹² In *ex parte* appeals, extensions of time under rule 136(a)¹³ had been available at least for the applicant's brief, but apparently no longer. The second point is noteworthy insofar as it is extended from interference cases (former rule 645) to all cases. Although the comments indicate that these standards are taken from rule 136(b) as well,¹⁴ that provision permits extensions on a showing of "sufficient cause," and does not discuss consideration of late filings under any standard. One might think that the standard of excusing late filings where consideration is in the interest of justice could substantially weaken the rule, insofar as practically every filing is made in the interest of obtaining justice from the Board. However, the Board has generally required a relatively stringent showing in interference cases of some procedural injustice or error that caused the late filing.

The new rules further provide for appearance *pro hac vice* by one who is not registered with the PTO to practice in patent cases.¹⁵ The inventor or owner of an application or patent has always had the right to represent himself or herself, or to appoint a registered practitioner to act on his or her behalf. This rule is a significant change to that policy, and notably there is no official comment or response to any external comment concerning it. While clearly there is an advantage to having representation by one registered with the PTO and well-familiar with its rules and procedures, there may be cases in which an inventor or business will consider it reasonable to ask the Board to allow someone not registered to handle *ex parte* appeals, *inter partes* reexamination appeals, and contested cases. No indication is given as to the standards, if any, the Board will apply in considering *pro hac vice* requests. It may be, to the possible detriment of the quality of representation, that such requests will be granted as a matter of course.

Parties before the Board are also required to identify their respective real party in interest and any judicial or administrative proceeding that "could affect,

11. 37 C.F.R. § 41.4.

12. The most recent Standing Order, modified in 2003, may be found on the PTO website at <http://www.uspto.gov/web/offices/dcom/bpai/standing2003May.pdf> (last modified May 1, 2003).

13. See 37 C.F.R. § 1.191 (2003) (repealed 2004).

14. See Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,961.

15. 37 C.F.R. § 41.5 (2004).

or be affected by,” the action of the Board.¹⁶ Changes in those facts must be reported to the Board within twenty days. Identification of the real party in interest is not new, as is the identification of related cases, generally paralleling former rule 656(b)(2). This practice, of course, is not unusual in litigation-type proceedings, for example, as an aspect of a motion to stay or to consolidate. This rule makes such identifications mandatory, and further requires changes to be promptly reported. The comments note that the requirement is “substantially the same in scope as Fed. Civ. R. 47.5.”¹⁷ Examples given include a case interpreting a term identical to that before the Board, or a case in which an adverse judgment could work an estoppel.¹⁸ If the Board rejects claims in appeal, or awards claims to an opponent in interference, then the loser is estopped from seeking or relying on such claims in other proceedings. The comments further note that failure to observe this rule could mean that a party fails in its duty of candor to the PTO, given in 37 C.F.R. § 1.56.¹⁹

Other aspects of subpart A are ground rules that had previously been found in such places as the Board’s Standing Order for interferences. Specific provisions concerning availability to the public of Board records (37 C.F.R. § 41.6), filing and rejection or expungement of papers (§ 41.7), correspondence addresses (§ 41.10), ex parte communications (§ 41.11), and systems for citation of authority (§ 41.12) are provided in this centralized location to affect all Board proceedings.²⁰

B. Subpart B: Ex Parte Appeals

Subpart B of Part 41 is specifically directed at ex parte appeals, whether of a regular national application, a reissue application, or an ex parte reexamination application.²¹ Appeals from inter partes reexamination are governed by the regulations in subpart C, discussed below. It is recommended that patent prosecutors review the rules in subpart B, consisting of 37 C.F.R. §§ 41.30 through 41.54, in its entirety. Even though much of the appellate procedure remains the same, and of course there are no changes to the substance of patentability law, there are several changes of particular note.

The appeal brief is governed by new 37 C.F.R. § 41.37. The comments regarding that section noted that the requirements of former rule 192²² for briefs are retained while additions and changes have been made.²³ As a general matter,

16. *Id.* § 41.8.

17. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,972.

18. *Id.*

19. *Id.*

20. 37 C.F.R. §§ 41.6-41.7, 41.10-41.12.

21. *See* 37 C.F.R. § 41.30.

22. 37 C.F.R. § 1.192 (2003) (repealed 2004).

23. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,975.

the rule requires ten elements in the appeal brief including an identification of the real party in interest and any related appeals and interferences, which is apparently a redundancy in light of rules in subpart A, discussed above.²⁴ The appeal brief further requires a statement of the status of all claims, a statement of the status of amendments filed after a final rejection, a summary of the claimed subject matter, and the grounds of rejection that are to be reviewed. Following the argument, three appendices are to be provided, one with a clean copy of the claims on appeal, one with evidence entered by the examiner, and one with documents issued by a court or the Board in a related case.²⁵

Two aspects of this new listing of appeal brief elements merit further discussion. First, an appellant “not represented by a registered practitioner” need not provide a summary of the claimed matter or the grounds of rejection to be reviewed, and “need only substantially comply” with the other requirements.²⁶ No further explanation in the comments concerning this provision is given. Clearly, an appellant representing herself would fit within the rule, and for good reason—such a person is generally not trained in the patent laws and rules. Additionally, however, the ability of the Board to recognize non-registered persons *pro hac vice* seems to create another category of persons that need not comply with all aspects of 37 C.F.R. § 41.37, particularly aspects that may affect claim coverage such as the summary of the claimed matter (further discussed below). This is less understandable, since one that seeks representation before the Board should use someone educated in the Board’s procedures. It seems that the PTO may have given an incentive to appellants to avoid seeking assistance from those registered to practice before it.

Another provision of particular note is the requirement of a summary of the claimed subject matter. The summary is required for each independent claim in the appeal, and must refer to the specification by page and line number, and to the drawing(s) by reference characters. Means-plus-function elements must be identified with corresponding structure, material or acts noted by similar reference to the specification and drawing(s). The comments note the presence of a similar, albeit frequently ignored, requirement in former rule 192, and thus practitioners should recognize that the Board apparently intends to take this requirement seriously.²⁷ This “summary” requirement in new 37 C.F.R. § 41.37 is essentially the same as was previously required under the Standing Order in interferences. The comments note that the sufficiency of the “concise explanation” under this rule is a case-by-case determination. The overall goal is “to aid the Board in considering the subject matter of the independent claims” toward an informed ultimate decision on patentability.²⁸ The minimum appears, based on the commentary, to be the references to the specification and drawings

24. 37 C.F.R. § 41.37 (2004).

25. *Id.* § 41.37(c)(1)(viii)-(x).

26. *Id.* § 41.37(c)(1).

27. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,975.

28. *Id.* at 49,976.

specified in the rule. Note also that this summary of claimed subject matter will likely have significant effect on claim scope. Traditional claim construction analysis relies at least in part on comments made as to the invention or claims by the applicant during prosecution. The comments to new 37 C.F.R. § 41.37 bluntly explain, “whether the explanation is limited to a single drawing or embodiment or is extended to all drawings and embodiments is a decision appellant will need to make.”²⁹ This seems to place the onus on the appellant to ensure that the full scope of the claims is before the Board, and if the appellant’s subject matter “summary” does not clearly embrace the entirety of disclosure corresponding to a claim, then there is a risk that the claim(s) will be limited.

Following filing of appellant’s brief, the examiner “may” provide a written answer. Although the new rules do not specify the penalty or procedure if an examiner’s answer is not filed, it is presumed that existing procedure permitting the examiner to withdraw rejections will be continued.³⁰ Previously, the examiner could not include a new ground of rejection in his answer, but could reopen prosecution and issue a new rejection, to which the appellant could respond or request that the appeal be reinstated.³¹ New 37 C.F.R. § 41.39 seeks to compress that procedure. The examiner’s answer now may include new grounds of rejection, and the appellant then has the option to request reopening of prosecution, which operates to withdraw the appeal, or to maintain the appeal by filing a reply brief.³² Thus, it is no longer the examiner who makes the decision on whether to reopen prosecution at this point. Rather, the applicant has that choice in cases in which a new ground of rejection is offered.

The examiner does, however, have the option to withdraw rejections and reopen prosecution if the appellant files a reply brief and includes a new issue in that brief, pursuant to new 37 C.F.R. § 41.41.³³ Alternatively, an examiner can provide a supplemental answer to such new issues, but that supplemental answer cannot include new rejection grounds.³⁴ While apparently removing a step and some complexity in the examiner’s original answer procedure, that step is potentially reintroduced in a supplemental answer to a reply brief.

Once the appeal is fully briefed, and argument is had (if requested pursuant to new 37 C.F.R. § 41.47), the Board may affirm the rejection(s) with respect to some or all claims, reverse them, remand the case to the examiner, or issue a new ground of rejection.³⁵ The Board can also request additional briefing.³⁶ An affirmance or reversal ends the case with respect to the claims so adjudged, unless the applicant exercises the right of civil action to the United States District

29. *Id.*

30. *See* PATENT AND TRADEMARK OFFICE, DEP’T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE § 1208 (8th ed. 2003) [hereinafter MPEP].

31. MPEP § 1208.02.

32. 37 C.F.R. § 41.39 (2004).

33. *Id.* § 41.41.

34. *Id.*

35. *Id.* § 41.50.

36. *Id.* § 41.50(d).

Court for the District of Columbia, or to the United States Court of Appeals for the Federal Circuit.³⁷ On remand to the examiner, or on issuing a new ground of rejection, the appellant has the option to reopen prosecution, on one hand, or to maintain the appeal or request rehearing on the other.³⁸ The Board may also remand with a statement of how a claim or claims can be amended to overcome rejection(s).³⁹ In such a case, the appellant is permitted to amend the claim(s) to conform to the statement.⁴⁰

C. Subpart C: Inter Partes Reexamination Proceedings

Subpart C, including 37 C.F.R. §§ 41.60 through 41.81, is applicable to appeals to the Board from an examiner's decision in an inter partes reexamination.⁴¹ The rules of this subpart are very similar to the rules of subpart B, dealing with ex parte appeals. The significant differences arise from the fact that there are two parties participating in an inter partes reexamination, as well as the examiner. Accordingly, provisions are made for not only appeal,⁴² but also for cross-appeal,⁴³ briefs for appellant (or cross-appellant)⁴⁴ and respondent(s),⁴⁵ and rebuttal briefs.⁴⁶ The provisions concerning Board decisions also reflect the dual-participant nature of these proceedings.⁴⁷

D. Subpart D: Contested Cases

Contested cases, as defined above, are the province of subpart D of new Part 41.⁴⁸ As previously discussed, only interferences and interference-like proceedings are specifically identified in the comments as being "contested cases."⁴⁹ Nonetheless, this commentator believes that the new codification of rules suggest that other "contested cases" could be created, e.g., European-style opposition procedures, that could easily fit into these rules. Until then, however, the rules of subpart D will effectively apply to interferences only.

The subpart starts off with a codification in 37 C.F.R. § 41.102 of a standard procedure. A contested case cannot be initiated, unless the Board authorizes otherwise, without completion of examination of each involved application or

37. See 35 U.S.C. §§ 141, 145 (2000 & Supp. 2002).

38. 37 C.F.R. § 41.50(d).

39. *Id.*

40. *Id.* § 41.50(b).

41. *Id.* §§ 41.60-41.81.

42. *Id.* § 41.61(c).

43. *Id.* § 41.61(b).

44. *Id.* § 41.67.

45. *Id.* § 41.68.

46. *Id.* § 41.71.

47. *Id.* §§ 41.77-41.81.

48. *Id.* §§ 41.100-41.158.

49. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,960-61.

patent, and without at least one otherwise patentable claim from each application or patent that would be involved in the case.⁵⁰ This substantially accords with prior interference procedure, in which no application could go to interference unless it was otherwise allowable on the examination record, and no interference would be declared without claim(s) to the “same patentable invention” existing in each involved application or patent.⁵¹ As noted above, the provision includes an exception that could swallow the rule if the Board were to allow it, i.e., that the Board can otherwise authorize initiation of a contested case. A similar exception regarding the conduct of contested cases is found in 37 C.F.R. § 41.104, which allows an administrative patent judge to waive or suspend any rule in subpart D.⁵²

Section 41.120 introduces a “notice of requested relief,” which appears to be analogous to the preliminary statement of prior interference practice. This section permits the Board to require a “notice stating the relief [a party] requests and the basis for its entitlement to relief.”⁵³ If such a notice is required, the Board may maintain it in confidence from the other party for a time.⁵⁴ Such a notice limits the party to filing substantive motions that are consistent with the notice.⁵⁵ The party is further allowed to move to correct its notice.⁵⁶ The preliminary statement under the prior interference rules included, among other things, the parties’ contentions as to their respective earliest conception, reduction to practice and diligence dates, the inventor(s) of the subject matter at issue, and an indication of whether derivation would be claimed in the interference.⁵⁷ The party could not prove dates earlier than those included in the preliminary statement, and could be prevented from later claiming derivation if such an allegation was not made in the statement. Once again, it appears that this new section takes a piece from prior interference regulations and both generalizes it to the category of “contested cases” and compresses it into a single provision, without most of the details in the previous regulations.

Most of the remainder of subpart D tracks provisions of prior interference practice set forth in the Board’s previous Standing Order for interferences.⁵⁸ For example, the physical form of filings and service requirements;⁵⁹ identification of counsel;⁶⁰ obtaining copies of PTO records;⁶¹ and filing a clean copy of involved claims as well as an annotated copy with reference to drawings and

50. 37 C.F.R. § 41.102.

51. See MPEP § 2301.01; see also 37 C.F.R. §§ 1.601(n), 1.603 (2003) (repealed 2004).

52. 37 C.F.R. § 41.104(b).

53. *Id.* § 41.120.

54. *Id.*

55. *Id.* § 41.120(b).

56. *Id.* §§ 41.120(c), 41.121(a)(2).

57. See 37 C.F.R. §§ 1.621-1.628 (2003) (repealed 2004).

58. See *supra* note 12 and accompanying text.

59. 37 C.F.R. § 41.106 (2004).

60. *Id.* § 41.108.

61. *Id.* § 41.109.

specification. Motion practice⁶² is generalized, but remains essentially the same as before. In the old interference rules, rules 633 to 635 concerned motion practice on all subjects.⁶³ These provisions are generalized to refer to “contested cases” and compressed into new 37 C.F.R. § 41.121. In the latter section, substantive motions to redefine the scope of the case, change benefit accorded, or for judgment are permitted “to the extent the Board authorizes.”⁶⁴ The new rule apparently leaves space for a new Standing Order, at least where motion practice is concerned. Responsive motions may also be authorized, such as a motion to amend or add claims, change inventorship, “or otherwise cure a defect” raised by a notice of requested relief or by a substantive motion.⁶⁵

Arbitration is provided for in 37 C.F.R. § 41.126. The comments state that the section merely recodifies prior arbitration provisions.⁶⁶ Similarly, the comments note that 37 C.F.R. § 41.127 on judgment recodifies current practice.⁶⁷ The comments thus indicate how these sections are likely to be interpreted. Nonetheless, practitioners wishing to use arbitration or considering requesting judgment must review these rules, in their general language, to gauge their effect on a given case.

Sections 41.150 through 41.158 govern matters of discovery and evidence.⁶⁸ As before, no discovery is available without agreement from the other party, except (1) for references, patents or applications, and test standards mentioned in a party’s patent or application, (2) by request to the Board with a showing that such discovery is in the interests of justice, or (3) during authorized testimony or cross-examination.⁶⁹ Applicability of the Federal Rules of Evidence, taking testimony by affidavit and cross-examination by deposition, and expert testimony standards are as currently practiced.

E. Interference Rules

The last subpart of Part 41 is directed specifically to interference proceedings.⁷⁰ Although in many aspects the procedures and standards have not changed, the substantial overhaul and insertion of certain changes suggests a piecemeal review of the sections.

Sections 41.200 and 41.201 set forth policy and definitions. The former settles what had at times been in question in interference practice, how to interpret a claim. The section states that a claim is to be given the “broadest

62. *Id.* §§ 41.121-41.123.

63. 37 C.F.R. §§ 1.633-1.635 (2003) (repealed 2004).

64. 37 C.F.R. § 41.121 (2004).

65. *Id.*

66. Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,968.

67. *Id.*

68. 37 C.F.R. §§ 41.150-41.158.

69. *Id.* § 41.150.

70. *Id.* §§ 41.200-41.208.

reasonable construction in light of the specification.”⁷¹ It also confirms Board policy of administering interferences so that an individual interference proceeding does not last more than two years. Section 41.201 provides explicit definitions for several terms that had been implicitly understood previously, and recasts or newly defines other terms. For example, the implicitly-defined term “accord benefit” is explicitly defined by this section in terms of Board recognition of a constructive reduction to practice.⁷² The term “constructive reduction to practice,” in turn, is defined to be “a described and enabled anticipation under 35 U.S.C. 102(g)(1) in a patent application of the subject matter of a count.”⁷³ Note that this definition includes “described” and “enabled,” apparently referring to standards under 35 U.S.C. § 112, but does not include a reference to the “best mode” requirement of that section.⁷⁴ It thus recognizes the prior case law indicating that best mode considerations are not applicable to a determination of whether one’s specification discloses the count. “Count” itself has been redefined to restate the position of countless interference opinions, to say that it is “the Board’s description of interfering subject matter that sets the scope of admissible proofs on priority.”⁷⁵ This new definition should not alter interference substance or procedure, because it reflects existing case law and Board practice is commonly to define a count as equal to one or more claims of each application or patent.

A new term included in the “definitions” section of 37 C.F.R. § 41.201 is “threshold issue.”⁷⁶ A “threshold issue” is a general term for issues which, if they are resolved in favor of one party, would “deprive the opponent of standing in the interference.”⁷⁷ In other words, a win on a “threshold issue” means that there is no ground to continue contesting the interference. Two sets of examples are given. The first example is no-interference-in-fact.⁷⁸ Consistent with prior procedure, therefore, a successful motion showing that the allegedly interfering subject matter does not in fact interfere⁷⁹ means that both parties go their separate ways with claims intact. A second set of examples is given for application claims “first made” after publication of the opponent’s application or patent.⁸⁰ In such a case, a “threshold issue” is whether the application meets the repose requirement of 35 U.S.C. § 135(b).⁸¹ Another “threshold issue” is whether the claim meets the written description requirement⁸² in cases where “applicant

71. *Id.* § 41.200.

72. *Id.* § 41.201.

73. *Id.*

74. 35 U.S.C. § 112 (2000).

75. 37 C.F.R. § 41.201.

76. 37 C.F.R. § 41.201.

77. *Id.*

78. *Id.*

79. *See id.* § 41.203.

80. *Id.* § 41.201.

81. *Id.*

82. 35 U.S.C. § 112 (2000).

suggested, *or could have suggested*, an interference under § 41.202(a).”⁸³ By the specific terms of the rule, these examples of “threshold issues” are not exclusionary. Thus, other types of issues that would deprive the opponent of standing, such as demonstrating the unpatentability of the opponent’s claim(s), would appear to be “threshold issues” as well.

Section 41.202 is dedicated to the ways and requirements of suggesting an interference.⁸⁴ Applicants have long been entitled to try to provoke an interference in appropriate cases. This section codifies earlier practice, and presents strong new requirements for applicants seeking interference. Under the new rule, a patent applicant must file:⁸⁵ (1) an identification of the application or patent with which interference is sought; (2) an identification of all claims believed to interfere, a proposal of one or more counts, and a demonstration of the correspondence of the claims to the counts; (3) a claim chart for each count comparing claim(s) that correspond to the count, showing why the claims interfere;⁸⁶ (4) an explanation “in detail” why the applicant will prevail on priority; (5) a claim chart for claims added or amended to provoke interference showing written description in the application; and (6) a chart for any application or patent to which benefit is desired showing that application or patent gives a constructive reduction to practice “within the scope of the interfering subject matter.”⁸⁷ This provision lumps together several aspects of prior practice, and adds significantly to an applicant’s burden in seeking interference.⁸⁸ Item (1) is the same as a requirement in former rule 604.⁸⁹ Item (2) goes into more detail than was previously required by asking for an identification of *all* claims believed to interfere and a demonstration of their correspondence to the proposed

83. 37 C.F.R. § 41.201 (emphasis added). The italicized text appears to make the written description “threshold issue” applicable to practically all cases, since in most or all cases in which an applicant is aware of another’s potentially interfering application or patent, the applicant “could have suggested” a claim for interference. The requirements an applicant must meet to suggest a claim for interference are discussed below with respect to 37 C.F.R. § 41.202. The only matter that would seem to prevent an applicant from suggesting a claim for interference is that the applicant is unaware of the opposing application. The comments surrounding the rulemaking suggest that this provision is included for prevention of “spuriously provoked interferences.” Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,969.

84. 37 C.F.R. § 41.202.

85. The rule does not use the term “file,” but given that filing (whether hardcopy or electronically) is the standard procedure for making requests and arguments to the PTO, and there does not appear to be any provision for a suggestion of interference orally, filing the given information seems mandated.

86. The standard for interfering subject matter is set forth in 37 C.F.R. § 41.203, as further discussed below.

87. 37 C.F.R. § 41.202(a).

88. It is noted that the comments claim that this section restates the requirements of former interference rules 604, 607 and 608. As further discussed, this commentator believes that there are significant additional requirements.

89. 37 C.F.R. § 1.604 (2003) (repealed 2004).

count(s). Previously, rules 604 and 607 required such an identification and demonstration for at least one claim.⁹⁰ A claim chart of opposing claims and the proposed count(s), with a showing of why the claims interfere, is a new requirement. An explanation of why the applicant will prevail is akin to the showing of *prima facie* priority under former rule 608, which required evidence and argument showing *prima facie* priority where the application had an effective filing date more than three months after that of a patent against which an interference is sought.⁹¹ The new rule requires such an explanation for any suggestion of interference, not just one in which the application is filed more than three months after a patent. In some cases, that explanation could simply be a prior United States filing or foreign benefit. In others, substantial evidence of conception, actual reduction to practice, and/or diligence may need to be presented. The aphorism of interference practice to thoroughly search for and gather evidence as early as possible, and preferably before suggesting or declaring an interference, has never been truer. Items (5) and (6) require charts showing written description in the applicant's application (not the application or patent from which a claim was copied) and earlier benefit documents are new requirements as well.⁹²

Section 41.202 includes a subsection (d)⁹³ that repeats and extends the requirements of former rule 608.⁹⁴ Where an applicant wants to suggest an interference, and that applicant's earliest constructive reduction to practice is later than the "apparent" earliest constructive reduction to practice of the potentially interfering patent or application, then the applicant must show a basis for winning on priority.⁹⁵ The use of the word "apparent" is not further explained in the comments, and would seem to refer at least to the earliest parent application from which the patent in question is a continuation or division, as opposed to a continuation-in-part. Nonetheless, prudent practice would suggest providing evidence sufficient to get behind the filing date of the earliest parent application, even if a continuation-in-part is interposed in the lineage. Like superceded rule 608, under this rule the applicant must provide documentation, affidavits and/or other evidence that would "support a determination of priority" in his or her favor if unrebutted.⁹⁶ The term "support" in that phrase is uninformative. The comments to the rule, as well as the understanding of the application of former rule 608, suggest that this language requires a *prima facie* case, i.e., one that would entitle the party to judgment absent any rebuttal.⁹⁷

90. *Id.* §§ 1.604, 1.607.

91. *Id.* § 1.608.

92. Such claim charts were not required under prior practice. Frequently, such claim charts might be provided as evidence or argument for motions for benefit to a prior application under former rules 633 and 637(f). 37 C.F.R. §§ 1.633, 1.637(f).

93. 37 C.F.R. § 41.202(d) (2004).

94. 37 C.F.R. § 1.608 (2003) (repealed 2004).

95. 37 C.F.R. § 41.202(d) (2004).

96. *Id.* § 41.202(e).

97. *See* Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg.

If the showing under that subsection (d) is insufficient, the patent examiner and/or the Board appear to have two choices. First, insofar as such insufficiency makes the suggestion of interference incomplete, it may be determined that no interference between the applicant's application and the potentially opposing reference should be initiated.⁹⁸ In that case, the suggesting applicant would be left with its application presumably under rejection over the reference. The second choice is provided by the new rules. Even with a failure of the showing of priority, the Board may nonetheless declare an interference in order to issue an order to show cause why judgment should not be entered against the suggesting applicant.⁹⁹ No further evidence can be entered in response to the order, although motions to redefine the interference or to change benefit may be authorized.¹⁰⁰ In this instance, the applicant is in a more difficult position, having to explain how its showing was adequate without further evidence. If the applicant cannot meet the order to show cause, then judgment against it results, with the concomitant interference estoppel against its involved claims and other subject matter not separately patentable over the interference count.

Section 41.203, entitled "Declaration," does not appear to add new procedure or substance.¹⁰¹ It defines the existence of an interference as the situation where the subject matter of one claim of one party anticipates or renders obvious the subject matter of another party's claim, and vice versa, assuming each claim was prior art to the other.¹⁰² This standard is intended to reflect the current state of the law.¹⁰³ The notice declaring the interference, as before, identifies the interfering subject matter (i.e., the count(s)), the involved patent(s) or application(s) and their claims, the benefit accorded each party regarding the count, and the claims corresponding to each count. A party wishing to add an application or patent to a declared interference may suggest the addition by following the provisions of 37 C.F.R. § 41.202, discussed above.¹⁰⁴

The remaining sections of subpart E follow relatively closely with prior provisions of the interference regulations. A notice of basis for relief, essentially identical to the prior requirement of a preliminary statement, is required by 37 C.F.R. § 41.204.¹⁰⁵ Provisions for filing of agreements settling interferences are given in 37 C.F.R. § 41.205.¹⁰⁶ This new section provides relatively in-depth explanation of when an interference is terminated, and thus the deadline for filing such a settlement agreement. Government representatives may access such agreements on written request, while others must show good cause for such

at 49,969.

98. See 37 C.F.R. § 41.202(d).

99. *Id.* § 41.202(d)(2).

100. *Id.*

101. *Id.* § 41.203.

102. *Id.* § 41.203(a).

103. See 69 Fed. Reg. at 49,992.

104. 37 C.F.R. § 41.203(d).

105. *Id.* § 41.204. See discussion of 37 C.F.R. § 41.120, *supra* Part I.D.

106. *Id.* § 41.205.

access. Presumptions in an interference are set forth in 37 C.F.R. § 41.207, and again provide nothing substantively new.¹⁰⁷ Claims corresponding to a count stand or fall together for purposes of determining priority and derivation, and a showing of the unpatentability of one of a party's claims corresponding to a count results in unpatentability of all of that party's claims corresponding to that count, unless the party can rebut such presumption of unpatentability.¹⁰⁸ Finally, 37 C.F.R. § 41.208 addresses content of motions, in addition to the requirements of 37 C.F.R. § 41.121.¹⁰⁹ Of particular note in this section is the requirement to show the patentability of a claim or a count sought through motion to be added or amended.¹¹⁰ The comments do not explain what that showing might be.¹¹¹ As far as the requirements of 35 U.S.C. § 112, it may be relatively easy to show how the claim meets the written description, enablement, and best mode requirements. As to prior art, it is clear that such a showing is the difficult proposition of proving the negative, i.e., that there are no prior art references that anticipate or render obvious the claimed subject matter. Presumably, a minimal showing would include a comparison of the new or amended claim or count to references cited in prosecution of one or both involved cases.

II. *PHILLIPS V. AWH CORP.*: CLAIM CONSTRUCTION CHANGE IS COMING

The Court of Appeals for the Federal Circuit agreed in 2004 to a complete en banc review of the procedures and standards used in interpreting patent claims. The result is forthcoming, and may be issued by the time this article goes to press. In the meantime, prosecutors who are now writing and prosecuting patent applications and litigators who are attacking or defending patents are waiting with bated breath to see how the Federal Circuit will rule.

In its first ruling in the case of *Phillips v. AWH Corp.*,¹¹² the Federal Circuit reviewed the district court's construction of the claims at issue from U.S. Patent No. 4,677,798, which discloses vandalism-resistant building modules.¹¹³ The case revolved around the meaning of the term "baffles" in the claims, a term not expressly defined in the specification. Even though the parties stipulated to a meaning for that term, the district court held it to be ambiguous because there was no identification in the claim of what the "baffles" acted on.¹¹⁴ The district court eventually reached the result that the term was to be limited in accordance with Section 112, paragraph 6.¹¹⁵ Finding that the patent specification adverted

107. *Id.* § 41.207.

108. *Id.* § 41.207(b)-(c).

109. *Id.* § 41.208.

110. *Id.* § 41.208(c).

111. See Rules of Practice Before the Board of Patent Appeals and Interferences, 69 Fed. Reg. at 49,969.

112. 363 F.3d 1207 (Fed. Cir. 2004).

113. *Id.* at 1209.

114. *Id.* at 1210.

115. 35 U.S.C. § 112 (2000).

to resistance to heat, sound, and fire and projectile deflection, and observing that the specification and drawings showed “baffles” at non-perpendicular angles to wall faces, the court decided that a “baffle” is limited to structure that extends “inward from the shell walls at oblique or acute angles [and] form an intermediate, interlocking barrier” within the wall.¹¹⁶ After Phillips conceded that he could not prove infringement under the given construction and the district court’s subsequent granting of summary judgment against him, Phillips appealed.

The Federal Circuit panel, composed of Judges Newman, Lourie, and Dyk, split on its review. Judges Newman and Lourie joined in the opinion for the majority, which overturned the district court’s decision, and proceeded to take one side of an ongoing claim construction debate. The substance of the opinion began by recognizing that “baffle” is not in means-plus-function language. The panel majority supported that conclusion by noting that the word “means” was not present, raising a presumption against a “means-plus-function” interpretation, and further by stating that “‘baffle’ is a sufficient recitation of structure, which carries its ordinary meaning” that is substantially the same as urged by the parties below.¹¹⁷ The majority further referred generically to intrinsic and extrinsic evidence that supported the meaning as applied to heat, sound, and projectiles. On this point, the majority’s analysis is consistent with prior case law and, based on the facts noted in the opinion, it is apparently correct, as Judge Dyk states in dissent.¹¹⁸

It is axiomatic in patent law that the principal and primary determinant of the protection afforded by the claim is the language of the claims. The meaning(s) of individual words or phrases as used in those claims, however, are potentially influenced by several factors, among which are the patent’s specification, drawings and prosecution history, and common meanings of a term or special meanings in a given field. Opinions on claim construction within the last three to four years appear to follow two very general lines of thought. One is based on the construction axiom that a claim is to be interpreted in light of the specification and prosecution history. This analysis leads to defining claim terms relatively closely to the embodiment(s) of the claimed invention shown in the patent, and, in some cases, leads to improperly limiting the claims by reading in limitations from the specification or drawings.¹¹⁹ The second line of thought begins with the common ordinary meaning of a claim term and limits that meaning only where there is an express or implicit limitation of the meaning evident from the patent specification.¹²⁰ While most opinions will recognize at least portions of both theories, one basis for interpreting words or phrases in a claim can generally be observed to have carried the day in a given case.

The panel majority in *Phillips* took the former route. After discarding the district court’s construction, the majority began its own interpretation of “baffle”

116. *Id.*

117. *Id.* at 1212 (emphasis added).

118. *Id.* at 1216 (Dyk, J., dissenting).

119. *See* *Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1204-05 (Fed. Cir. 2002).

120. *Id.* at 1204 (referring to a “manifest” exclusion or restriction of claim scope).

by stating they had to “read the claims in view of the specification and determine whether the patentee has otherwise limited the scope of the claims” with respect to that term.¹²¹ Although they recited case law noting that ordinary meaning of a term does not obtain where the patentee disclaimed a meaning, termed a feature “important” to the invention, or distinguished the term from prior art, the focus of their analysis is given in their final sentence concerning claim construction: “we look to the specification ‘to ascertain the meaning of a claim term as it is used by the inventor in the context of the entirety of his invention.’”¹²²

Starting from that premise, the majority then recites language from the patent’s specification to demonstrate that it is “rife with references to impact resistance,” and thus the term “baffle” requires the features identified by the district court. They rely on statements in the specification about how the disclosed walls resist or deflect projectiles, and that there are not “effective ways” of dealing with them “with inexpensive housing in the prior art,” to support the conclusion that the patentee had distinguished his “baffles” from prior art structures. The panel majority’s conclusion is that “baffle” requires an angle with a wall that is not ninety degrees “[f]rom the specification’s explicit descriptions of the invention.”¹²³ Responding to the dissent’s criticisms, the majority asserts that they are not focusing only on the “preferred” embodiment, because what is in the patent’s specification is the only embodiment. The majority finally offers a policy basis for its decision as well: “It is in the interests of a sound patent system and inventors, as well as the public, to hold inventors to their disclosures. The trial judge correctly perceived this need, albeit mistakenly relying on the means-plus-function ground, and interpreted the claims in accordance with the specification.”¹²⁴

There are several points to criticize in the panel majority’s opinion, in this commentator’s opinion. However, the point to be made at this time is that the majority takes the view that it is the patent specification that is the most important, indeed perhaps the only, factor that informs the determination of what claim terms mean. The policy quote noted above does not accord with prior precedent, at least in mechanical patent cases, but it does provide a reason for looking first and foremost at the specification in interpreting claim terms.

The dissent, authored by Judge Dyk, takes the other path to claim interpretation, that is, looking to the ordinary meaning of a term, and considering the specification only insofar as it provides an explicit or implicit definition or otherwise specifically identifies a requirement of the invention. Relying principally on the earlier case of *Liebel-Flarsheim Co. v. Medrad, Inc.*,¹²⁵ the dissent makes two points clear. First, limiting claims to the preferred embodiment is improper unless the language of the claims so requires. Second, it is generally improper to add a limitation (in this case, “oriented at angles other

121. *Philips*, 363 F.3d at 1212-13.

122. *Id.* at 1213 (citations omitted).

123. *Id.* at 1213.

124. *Id.* at 1214.

125. 358 F.3d 898 (Fed. Cir. 2004).

than ninety degrees”¹²⁶) from the specification into a claim. Judge Dyk concludes by observing “there is no reason to supplement the plain meaning of the claim language with a limitation from the preferred embodiment.”¹²⁷

The case set up in direct opposition the two general modes of claim interpretation analysis. On consideration of Phillips’s petition for rehearing, the Federal Circuit withdrew the earlier panel opinion and agreed to rehear the appeal en banc.¹²⁸ The order granting rehearing explained that the court’s intention is “to resolve issues concerning the construction of patent claims” raised in the previous majority and dissenting opinions.¹²⁹ This remarkably open-ended scope of review was emphasized, as the court invited the parties to submit further briefing on “these issues” and with particular respect to seven specific questions:

1. Is the public notice function of patent claims better served by referencing primarily to technical and general purpose dictionaries and similar sources to interpret a claim term or by looking primarily to the patentee’s use of the term in the specification? If both sources are to be consulted, in what order?
2. If dictionaries should serve as the primary source for claim interpretation, should the specification limit the full scope of claim language (as defined by the dictionaries) only when the patentee has acted as his own lexicographer or when the specification reflects a clear disclaimer of claim scope? If so, what language in the specification will satisfy those conditions? What use should be made of general as opposed to technical dictionaries? How does the concept of ordinary meaning apply if there are multiple dictionary definitions of the same term? If the dictionary provides multiple potentially applicable definitions for a term, is it appropriate to look to the specification to determine what definition or definitions should apply?
3. If the primary source for claim construction should be the specification, what use should be made of dictionaries? Should the range of the ordinary meaning of claim language be limited to the scope of the invention disclosed in the specification, for example, when only a single embodiment is disclosed and no other indications of breadth are disclosed?
4. Instead of viewing the claim construction methodologies in the majority and dissent of the now-vacated panel decision as alternative, conflicting approaches, should the two approaches be treated as

126. *Phillips*, 363 F.3d at 1213.

127. *Id.* at 1217-18 (Dyk, J., dissenting).

128. *Phillips v. AWH Corp.*, 376 F.3d 1382 (Fed. Cir. 2004).

129. *Id.* at 382.

complementary methodologies such that there is a dual restriction on claim scope, and a patentee must satisfy both limiting methodologies in order to establish the claim coverage it seeks?

5. When, if ever, should claim language be narrowly construed for the sole purpose of avoiding invalidity under, *e.g.*, 35 U.S.C. §§ 102, 103 and 112?

6. What role should prosecution history and expert testimony by one of ordinary skill in the art play in determining the meaning of the disputed claim terms?

7. Consistent with the Supreme Court's decision in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), and our *en banc* decision in *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998), is it appropriate for this court to accord any deference to any aspect of trial court claim construction rulings? If so, on what aspects, in what circumstances, and to what extent?¹³⁰

Even a cursory review and consideration of these questions will make it quite plain that the Federal Circuit sees this case as an opportunity to review and reconsider practically every aspect of claim interpretation on a fundamental level.

The first topic or grouping of questions places the issue of whether ordinary meaning from dictionaries or the usage in the specification is the primary consideration firmly in the context of "the public notice function of patent claims."¹³¹ This would appear to be the clearest statement yet that the Federal Circuit views public notice as the foremost policy concern in claim construction matters. Roughly put, that policy would suggest that claims should provide the public with a clear notion of the claim's scope, and therefore what subject matter is to be avoided. Claims should accordingly be construed in a way that conforms with the public's expectations on reading the patent and any prosecution history. The fourth topic appears to complement, suggesting that instead of using one or another methodology, choosing dictionaries over the specification, or vice versa, that both methodologies might both affect claim scope.¹³²

Assuming dictionaries are to be the primary source of meanings, the second topic focuses on the limitations on use of that information.¹³³ The questions present here reflect issues that have received different treatments and weight of analysis from case to case in the District Courts and at the Federal Circuit. For example, different cases come to different conclusions as to what explicit language or implicit disclosure is required to limit the ordinary meaning of a term.

130. *Id.* at 1383.

131. *Id.*

132. *Id.*

133. *Id.*

On the other hand, the third topic posits that the patent specification is the primary meaning source, and asks what use should be made of dictionaries.¹³⁴ Here is one place where the fundamental nature of the court's consideration shows forth. The second question in this topic indicates that the court will reconsider decades-old common law holding that the patentee is not limited to the embodiment(s) described and shown in the patent. Clearly, there is no certainty that the court will do away with that holding. But with that hoary principle of patent law apparently on the table, the court is committed to reexamining all points affecting claim scope, and may discard or reform what had been previously considered unassailable tenets.

The final three topics concern more pin-point issues. It has long been an axiom that claims could be construed narrowly in order to preserve their validity, in light of the statutory presumption of validity¹³⁵ and the presumption that the examiner did his or her job properly.¹³⁶ A conflicting principle is that the scope of a claim should be "locked down" at the time the patent issues, determinable based on the public record and ordinary meanings. As to prosecution history and expert testimony, it is again axiomatic that what a patentee states and the actions he or she takes in the prosecution record can affect claim interpretation, at least where it demonstrates how the patentee was using or understood a term, or how he or she had specifically limited it. Although it seems unlikely that principle would be significantly changed, this is once again an indication of the depth of the court's consideration of claim construction issues. Expert testimony, although generally admitted on issues of claim meaning, has recently been questioned for its frequently partisan nature.¹³⁷ Finally, de novo review of district court construction rulings will be reconsidered, at least to decide whether deference to a district court's claim construction is possible given existing controlling authority.

Argument before the en banc Federal Circuit took place on February 8, 2005. No timetable for issuance of an opinion in this case is available at this time. Nevertheless, practitioners and inventors alike should be aware that the ground rules on claim interpretation may change substantially in the near future. Prosecution practices and strategies may need to be reevaluated thereafter.

III. KNORR-BREMSE: NO ADVERSE INFERENCE FOR UNPRODUCED OPINIONS

In *Underwater Devices, Inc. v. Morrison-Knudsen Co.*,¹³⁸ the fledgling Federal Circuit expressed an "affirmative duty" on the part of a potential patent infringer to observe another's patent rights, including "the duty to seek and

134. *Id.*

135. 35 U.S.C. § 282 (2000).

136. *See, e.g., Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984).

137. *See Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1203 (Fed. Cir. 2002).

138. 717 F.2d 1380 (Fed. Cir. 1983).

obtain competent legal advice from counsel.”¹³⁹ Three years later, the case of *Kloster Speedsteel AB v. Crucible Inc.*¹⁴⁰ built on that premise. Where the defendant presented no claim that it had sought counsel regarding the patent at issue prior to litigation, despite plaintiff’s warnings, and invoked attorney-client privilege, the Federal Circuit found that such silence “warrant[s] the conclusion that it either obtained no advice of counsel or did so and was advised that its . . . accused products would be an infringement.”¹⁴¹ From these cases, the principle that not producing an opinion of counsel regarding the freedom to operate in view of an issued patent leaves one “free to infer” that no opinion was obtained or that it was adverse to the defendant.¹⁴² That “adverse inference” of non-production of an opinion, in light of the duty identified in *Underwater Devices*, would lead to a finding of willful infringement.

On September 13, 2004, the Federal Circuit issued an en banc opinion in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.* that overruled that adverse inference.¹⁴³ After reviewing the development noted above, and stating that the prior focus was on disrespect for law, the court found that the precedent “resulted in inappropriate burdens on the attorney-client relationship,” and that the adverse inference is “no longer warranted.”¹⁴⁴ Specifically, the court held “that no adverse inference that an opinion of counsel was or would have been unfavorable flows from an alleged infringer’s failure to obtain or produce an exculpatory opinion of counsel. Precedent to the contrary is overruled.”¹⁴⁵

The court’s analysis centered around four questions that had been presented for en banc review. The first of these questions asked whether a claim of privilege allowed the trier of fact to draw an adverse inference for purposes of willful infringement, and the court answered in the negative.¹⁴⁶ This position is supported by reliance on the Supreme Court’s decision in *Upjohn Co. v. United States*, which stressed the deep-rooted importance of the attorney-client privilege, and by observing that a system in which invocation of privilege jeopardizes the client “can distort the attorney-client relationship, in derogation of the foundations of that relationship.”¹⁴⁷ The court distinguished cases in which a party creates an inference adverse to itself by refusing to produce evidence on the basis of the attorney-client privilege. That is, where the refusal to produce concerns privileged information, no adverse inference was drawn.

The second question narrowed the issue down to cases in which the defendant did not obtain any legal advice, and the court again stated that it is not

139. *Id.* at 1389-90.

140. 793 F.2d 1565 (Fed. Cir. 1986).

141. *Id.* at 1580.

142. *See* *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1572-73 (Fed. Cir. 1988).

143. 383 F.3d 1337 (Fed. Cir. 2004) (en banc).

144. *Id.* at 1343-44.

145. *Id.* at 1341.

146. *Id.* at 1344.

147. *Id.*

appropriate to draw an adverse inference on willful infringement.¹⁴⁸ The court found that there is no legal duty to consult with counsel, a breach of which would presume that the consultation would have been negative to the defendant. Referring to amicus briefs, the court noted burdens and costs of full exploration, analysis, and opining on all issues surrounding all potentially adverse patents the defendant knows about.¹⁴⁹ That is essentially the extent of the court's analysis on this question. While noting that defendants still have a duty of due care to avoid infringement, that duty does not necessarily extend to consultation of counsel.

The court's third question referred specifically to the outcome of the prior questions to the underlying case itself.¹⁵⁰ This portion of the opinion appears to be the most interesting, at least because it leaves open some questions for further consideration. The court began its discussion on this question by repeating that "there are no hard and fast per se rules" concerning willfulness, and by noting that factors have been identified that should be considered on both sides of the willfulness issue.¹⁵¹ The district court had found several facts, including an adverse inference based on withholding of an opinion of counsel, that indicated a finding of willfulness. Because the parties disputed whether the willfulness finding was adequately supported absent the adverse inference, the Federal Circuit remanded for further consideration.¹⁵²

Two points should be made here. First, the court implicitly reaffirmed the case-by-case analysis of factors for and against willfulness, and reviewed some of the evidence presented and comments of the trial court favoring willfulness. Information and trial presentations suggesting a lack of a good faith belief by the defendant of invalidity of the patent at issue, and failure to take remedial action after an infringement judgment, were specifically noted by the Federal Circuit.¹⁵³ Thus, while the death of the adverse inference may make a willfulness showing more difficult, it does not foreclose a willfulness presentation.

Second, the court did not consider the question of whether the trier of fact "can or should be told whether or not counsel was consulted (albeit without any inference as to the nature of the advice received) as part of the totality of the circumstances relevant to the question of willful infringement."¹⁵⁴ It thus remains an open question, for now, as to whether the mere existence of an opinion, or the mere fact of failure to consult counsel, can be introduced. On one side, such a fact could be likely to be more prejudicial than relevant, in violation of Federal

148. *Id.* at 1345.

149. *Id.*

150. *Id.* at 1346.

151. *Id.* at 1346 (quoting *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1110 (Fed. Cir. 1986)). See also *id.* at 1342-43 (citing *Rolls-Royce*, 800 F.2d at 1110; *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-27 (Fed. Cir. 1992) (regarding factors for consideration in the analysis of willfulness)).

152. *Knorr-Bremse*, 383 F.2d at 1346.

153. *Id.*

154. *Id.* at 1346-47.

Rule of Evidence 104, and may result in the jury drawing the conclusion (that the opinion, if given, would have been adverse and thus supportive of a willfulness finding) that the Federal Circuit rejected. On the other hand, the court can instruct the jury not to give that fact undue weight, emphasizing that no presumption can be drawn from the mere existence or non-existence of an opinion. Indeed, with no presumption as to the content of an opinion of counsel, it may be to an accused infringer's benefit to introduce the fact that he or she consulted with an attorney with respect to the patent at issue.

The final question took something of a reverse view, asking whether the existence of a "substantial defense to infringement" is sufficient to defeat willfulness where no legal advice has been obtained.¹⁵⁵ This question was summarily dealt with, as the court repeated the principle that willfulness is a case-by-case analysis and declined to make a bright line rule.¹⁵⁶ A defendant's substantial infringement defense is thus apparently not enough to win summary judgment against a willfulness finding.

To summarize, then, *Knorr-Bremse* allows an accused infringer to withhold advice received from counsel concerning a patent without suffering a presumption against him on the issue of willfulness. It also removes the prior duty to obtain advice of counsel on learning of a potentially adverse patent. Willfulness remains a fact issue to be determined on the totality of the circumstances of the case.

155. *Id.* at 1347.

156. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

Ten years after the Indiana General Assembly amended the Indiana Product Liability Act (“IPLA”)¹ in 1995, Indiana judges and product liability practitioners continue to explore and define the IPLA’s contours and requirements. The 2004 survey period² is a robust reminder that there is more work to do in this area, perhaps even by the General Assembly.

This survey does not attempt to address in detail all Indiana product liability cases decided during the survey period.³ Rather, it examines selected cases that are representative of the important product liability issues. This survey also provides some background information, context, and commentary where appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.⁴ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁵

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1. This survey article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

2. The survey period is October 1, 2003 to September 30, 2004.

3. There were many cases during the survey period that are not treated in detail here even though they involved substantive product liability allegations, either because they are unpublished or because they involve only procedural issues. *E.g.*, *Jennings v. AC Hydraulic A/S*, 383 F.3d 546 (7th Cir. 2004) (affirming the district court’s dismissal because the manufacturer’s contacts with Indiana were insufficient to establish personal jurisdiction in a case involving an allegedly defective floor jack); *Hunt v. Unknown Chem. Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138 (S.D. Ind. Nov. 5, 2003) (holding that claims involving an allegedly defective lumber treated with chromium copper arsenate were preempted because the failure to warn claims constituted a “requirement” for labeling or packaging that was “in addition to or different from” those required by the Federal Insecticide, Fungicide, and Rodenticide Act).

4. Act of Apr. 21, 1983, 1983 Ind. Acts 297.

5. Act of Apr. 26, 1995, 1995 Ind. Acts 278. *See Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought.⁷ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also in the class of persons that the seller should reasonably foresee as being subject to the harm caused;⁸ (2) a defendant that is a manufacturer or a seller engaged in the business of selling a product;⁹ (3) physical harm caused by a product;¹⁰ (4) a product that is in a defective condition unreasonably dangerous to a user or consumer or to his property;¹¹ and (5) a product that reached the user or consumer without substantial alteration in its condition.¹² Indiana Code

6. The current version of the IPLA is found at Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1 (2004).

8. Indiana Code section 34-20-1-1(1) identifies proper IPLA claimants as "users" or "consumers." This section also contains the additional requirement of being in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." *Id.* § 34-20-2-1(1).

9. *Id.* § 34-20-1-1(a) (identifying proper IPLA defendants as "manufacturers" or "sellers"). The additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product" is found within Indiana Code section 34-20-2-1(2), thus effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability. *Id.* § 34-20-2-1(2).

10. *Id.* § 34-20-1-1(3) (requiring "physical harm caused by a product").

11. *Id.* § 34-20-2-1 (containing the requirement that the product at issue is "in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property").

12. *Id.* § 34-20-2-1(3) (containing the requirement that the product at issue "is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable"). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff's burden of proof in a product liability action. It requires a plaintiff to prove each of the following propositions by a preponderance of the evidence: (1) The defendant was a manufacturer of the product (or part of the product) alleged to be defective and was in the business of selling the product; (2) the plaintiff was in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition; (3) the defendant sold, leased, or otherwise put the product into the stream of commerce; (4) the product was in a defective condition unreasonably dangerous to users or consumers (or to the user's or consumer's property); and (5) the product was expected to and did reach the plaintiff without substantial alteration of the condition in which the product was sold by the defendant.

As written, Indiana Pattern Jury Instruction 7.03 is nearly accurate. It fails, however, to include the plaintiff's burden to prove, first, that he or she fits within the IPLA's definition of

section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements “regardless of the substantive legal theory or theories upon which the action is brought.”¹³

A. “. . . brought by a user or consumer. . .”

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.” For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.¹⁴

“User” has the same meaning as “consumer.”¹⁵ Several published decisions in recent years construe the statutory definitions of “user” and “consumer.”¹⁶

“user” or “consumer” in addition to being in the class of persons the defendant should reasonably have foreseen as being subject to the harm. It also fails to reflect the important requirement that a “physical harm” was in fact and proximately caused by the product at issue.

13. IND. CODE § 34-20-1-1. In the wake of the 1995 amendments to the IPLA, practitioners and sometimes judges have seemed to struggle with what the IPLA covers and what it does not. Indiana Code section 34-20-1-1 provides that the IPLA governs and controls all actions brought by users and consumers against manufacturers or sellers (under the right circumstances) for physical harm caused by a product “*regardless of the substantive legal theory or theories upon which the action is brought.*” *Id.* (emphasis added). Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA’s statutory definitions are not governed by the IPLA. *See, e.g.,* N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability and that plaintiff could proceed on a warranty theory so long as it was limited to a contract theory). At the same time, however, Indiana Code section 34-20-1-1 provides that the “[IPLA] shall not be construed to limit any other action from being brought against a seller of a product.” IND. CODE § 34-20-1-1. That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-2 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover. *Id.* § 34-20-1-2; *see infra* text accompanying notes 242-48.

14. IND. CODE § 34-6-2-29.

15. *Id.* § 34-6-2-147.

16. *See* Butler v. City of Peru, 733 N.E.2d 912 (Ind. 2000) (holding that a maintenance

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition.”¹⁷ Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken.¹⁸ In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

For a discussion of the noteworthy *Vaughn v. Daniels Co.*¹⁹ case, see last

worker could be considered a “user or consumer” of electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Electric America, Inc.*, 713 N.E.2d 275 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes).

17. IND. CODE § 34-20-2-1(1). Indiana Code section 34-20-2-1 imposes liability when: a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.

18. It is important to recognize the distinction between the “reasonable foreseeability” test employed pursuant to Indiana Code section 34-20-2-1(1) and the wholly separate and distinguishable “reasonableness” components of Indiana Code sections 34-20-4-1, -4-3, and -4-4. Indiana Code section 34-20-4-1 provides that a product is in a “defective condition” if “at the time it is conveyed by the seller to another party, it is in a condition . . . not contemplated by reasonable persons among those considered expected users or consumers of the product.” *Id.* § 34-20-4-1. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].” *Id.* § 34-20-4-3. Indiana Code section 34-20-4-4 incorporates the same premise: “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.” *Id.* § 34-20-4-4.

Indiana Code section 34-20-4-1 employs a “reasonableness” test to measure the condition of the product relative to its risks among persons already *considered expected users or consumers*. Similarly, Indiana Code sections 34-20-4-3 and -4-4 employ a “reasonableness” test to determine whether the product is handled and consumed in expectable ways. These analyses are separate and distinct from an examination that employs “reasonableness” as a guidepost for a user’s or consumer’s foreseeability as a potential IPLA plaintiff.

19. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh’g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003).

year's survey article.²⁰ The *Vaughn* case is before the Indiana Supreme Court pending a transfer decision. However, the current survey period did not produce noteworthy cases on the interpretation of who qualifies as IPLA claimants.

B. "... against a manufacturer or seller ..."

For purposes of the IPLA, "manufacturer" means "a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer."²¹ "Seller" means "a person engaged in the business of selling or leasing a product for resale, use, or consumption."²² Indiana Code section 34-20-2-1(2) of the IPLA employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the "seller" is "engaged in the business of selling the product."²³

Sellers can be held liable as manufacturers in two ways. First, if the seller fits within Indiana Code section 34-6-2-77(a)'s definition of "manufacturer," which expressly includes a seller who:

(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the [name of the actual] manufacturer.²⁴

Second, a seller can be deemed a statutory "manufacturer" and, therefore, be held liable to the same extent as a manufacturer, in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a "manufacturer" if the court is "unable to hold jurisdiction over the manufacturer" and if the seller is the manufacturer's principal distributor or

20. Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1249-57 (2004).

21. IND. CODE § 34-6-2-77.

22. *Id.* § 34-6-2-136.

23. *Id.* § 34-20-2-1(2). *See, e.g., Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002) (recognizing that Indiana Code section 34-20-2-1 imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a "manufacturer" or "seller"); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a "manufacturer" of the plant).

24. IND. CODE § 34-6-2-77(a).

seller.²⁵

There is one other important provision about which practitioners must be aware when it comes to liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”²⁶ Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller,” and cannot be deemed a “manufacturer,” is not liable, and is not a proper IPLA defendant.²⁷

The Indiana Supreme Court’s decision in *Kennedy v. Guess, Inc.*²⁸ addresses the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. In *Kennedy*, Kaye Kennedy purchased a “Guess” watch at a Lazarus department store in Indianapolis.²⁹ As a gift for purchasing

25. *Id.* § 34-20-2-4. In *Goines v. Federal Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002), the court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to “personal jurisdiction.” The court refused to resolve the issue, deciding instead simply to deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Goines*, 2002 U.S. Dist. LEXIS 5070 at *15-16.

26. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

27. In *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. *Id.* at 725-26. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA, because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels), and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “A product liability action [based on the doctrine of strict liability in tort] may not be commenced or maintained. . . .” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 provides that “strict liability in tort” applies now only to IPLA cases based on a manufacturing defect. Indiana Code section 34-20-2-2 unequivocally provides that strict liability does not apply to warning or design claims, which are controlled by a negligence standard. Thus, if indeed the phrase “strict liability” means “liability without regard to the exercise of reasonable care,” then the only theory to which such a standard applies is a manufacturing defect theory. See, e.g., *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002).

28. 806 N.E.2d 776 (Ind. 2004), *aff’g in part and rev’g in part* 765 N.E.2d 213 (Ind. Ct. App. 2002).

29. *Id.* at 779.

the watch, she received a free umbrella also bearing the “Guess” logo.³⁰ Over a year later, Kaye’s husband, Richard, took the umbrella to work, where a co-worker swung it from the handle.³¹ The umbrella’s shaft separated from the handle and struck Richard in the nose.³²

Asserting both negligence and strict liability theories of recovery, the plaintiffs sued Guess, Inc. (“Guess”), which had licensed rights to Callanen International Inc. (“Callanen”) to market products bearing the Guess logo, including the watch and the umbrella at issue.³³ Plaintiffs also sued the umbrella’s Hong Kong-based manufacturer, Interasia Bag Manufacturers, Ltd. (“Interasia”), and its domestic distributor in New York, Interasian Resources, Ltd. (“Interasian”).³⁴ Plaintiffs were never able to successfully serve process on Interasia.³⁵

The trial court granted motions for summary judgment filed by Callanen and by Guess, determining that neither entity could be held “strictly” liable because neither was a manufacturer of the umbrella under the IPLA.³⁶ The Indiana Court of Appeals reversed, holding that none of the parties sufficiently designated evidence to establish the application of Indiana Code section 34-20-2-4.³⁷ The Indiana Supreme Court affirmed in part and reversed in part.³⁸

The first of two issues as phrased by the *Kennedy* court was “how the burden of establishing the presence of any genuine issue of material fact operates with respect to a statutory provision treating the ‘principal distributor or seller’ as a manufacturer.”³⁹ Acknowledging the statutory language in Indiana Code section 34-20-2-1 and Indiana Code section 34-20-2-3, the *Kennedy* court confirmed that, “[a]ctions for strict liability in tort are limited to *manufacturers* of defective products.”⁴⁰

Callanen and Guess argued that they were not “manufacturers” of the umbrella, nor were they principal distributors or sellers. In support of their argument, Guess and Callanen submitted affidavits from managerial employees to show that none of the factual predicates for the statutory exceptions under which a seller can be deemed a “manufacturer” were met.⁴¹ The affiants also stated that neither Guess nor Callanen had any ownership interest in, nor were they owned in whole or significant part by, Interasia or Interasian (the umbrella’s

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Kennedy v. Guess*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002), *aff’d in part and rev’d in part*, 806 N.E.2d 776 (Ind. 2004).

38. 806 N.E.2d at 779.

39. *Id.*

40. *Id.* at 780.

41. *Id.*

undisputed manufacturer and domestic distributor).⁴² If un rebutted, the *Kennedy* court determined, such evidence would have warranted summary judgment under Indiana Code section 34-20-2-3.⁴³ According to the Kennedys, however, they were entitled to keep Guess and Callanen in the lawsuit by virtue of Indiana Code section 34-20-2-4, which, as noted above, imposed liability by treating certain parties as though they were manufacturers if two conditions were met: “(1) the court was unable to hold jurisdiction over Interasia, the actual manufacturer; and (2) Callanen and Guess were Interasia’s principal distributor or seller.”⁴⁴

In order to establish that the court could not hold jurisdiction over Interasia, the Kennedys designated evidence that upon trying to serve Interasia at an address in Hong Kong, the “affirmation of non-service” indicated that no such corporation existed at the address provided.⁴⁵ In addition, the Kennedys contended that evidence offered by Guess and Callanen demonstrated that Interasia had no contacts with Indiana and no knowledge that its umbrellas were to be sold in Indiana.⁴⁶

The *Kennedy* court wrote that the distributor exception found in Indiana Code section 34-20-2-4 “does not turn solely on whether a plaintiff achieves service of process, though the ability or inability to get service is certainly relevant.”⁴⁷ “Rather,” the court recognized, “the legislature has chosen to permit liability of a domestic distributor or seller when the ‘court is unable to hold jurisdiction’ over the actual manufacturer.”⁴⁸ And, although that is a “mixed question of fact and law,” Callanen and Guess, “on the record as far as it got developed here,” failed to come forward with evidence sufficient to affirmatively establish that the court could, indeed, hold jurisdiction over Interasia.⁴⁹

In order to establish the second of the two required evidentiary conditions, namely that Callanen and Guess were the principal distributors or sellers of the umbrella, the Kennedys designated the fact that the umbrella bore only a “Guess” logo.⁵⁰ They also presented invoices demonstrating that Callanen purchased more than 93,000 umbrellas from Interasia in 1996 and that Callanen purchased \$235,000 worth of rafts, binders, bags, umbrellas, agendas and coolers from

42. *Id.*

43. *Id.*

44. *Id.* at 781.

45. *Id.*

46. *Id.* The Kennedys pointed out that Callanen ordered the umbrellas from its Connecticut office through Interasia’s affiliate in New York and paid them from its Connecticut office. *Id.* The umbrellas themselves were shipped from Hong Kong to Callanen’s Connecticut office. *Id.* The Kennedy’s argued, therefore, that the umbrellas randomly found their way into Indiana through the marketing promotions of Callanen and Guess, which, the Kennedys contended, is an insufficient basis for exercising jurisdiction over Interasia under Indiana Trial Rule 4.4(A). *Id.*

47. *Id.* at 782.

48. *Id.*

49. *Id.*

50. *Id.*

Interasia between April and September 1996.⁵¹ According to the *Kennedy* court, “the volume of business” reflected in such evidence “sufficiently establishes a genuine issue of material fact as to whether Callanen is a ‘principal distributor.’”⁵²

Insofar as Guess was concerned, however, the evidence failed to show that Guess was a distributor or seller of any sort, principal or otherwise. “Guess neither ordered nor received the umbrellas at issue. It was never in possession of any of the umbrellas nor did it manufacture, supply, distribute, assemble, design, or sell them. Rather, Guess simply licensed its name to Callanen for placement on various products.”⁵³ Accordingly, the court concluded that “summary judgment in favor of Guess on this issue was proper.”⁵⁴

It is worth noting that the *Kennedy* court makes what appears to be a premature and potentially confusing determination. Specifically, the court concludes that summary judgment was inappropriate because both Guess and Callanen could be deemed “manufacturers” under Indiana Code section 34-20-2-4 solely by virtue of the fact that the Kennedys offered some evidence to suggest that Indiana may have personal jurisdiction over Interasia.⁵⁵ The relevant

51. *Id.* at 783.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 781. In order to establish that the court could not hold jurisdiction over Interasia, the Kennedys designated evidence that upon trying to serve Interasia at an address in Hong Kong, the “affirmation of non-service” indicated that no such corporation existed at the address provided. *Id.* In addition, the Kennedys contended that evidence offered by Guess and Callanen demonstrated that Interasia had no contacts with Indiana and no knowledge that its umbrellas were to be sold in Indiana. The Kennedys pointed out that Callanen ordered the umbrellas from its Connecticut office through Interasia’s affiliate in New York and paid them from its Connecticut office. *Id.* The umbrellas themselves were shipped from Hong Kong to Callanen’s Connecticut office. *Id.* The Kennedys argued, therefore, that the umbrellas randomly found their way into Indiana through the marketing promotions of Callanen and Guess, which, the Kennedys contended, is an insufficient basis for exercising jurisdiction under Indiana Trial Rule 4.4(A). *Id.* Though finding such evidence “not especially impressive,” the court believed it “potent enough to demonstrate a genuine issue of material fact on the question whether Callanen and Guess are manufacturers under the domestic distributor exception of [Indiana Code section 34-20-2-4].” *Id.*

The court rejected arguments offered by Callanen and Guess to the effect that the Kennedys used “less than diligent effort” to determine whether Interasia had moved to another location since the umbrellas were made for Callanen. *Id.* Specifically, Callanen and Guess pointed to the fact that the Kennedys attempted service based upon an address found in a 1996 memo, yet more recent documents reflected a different address for Interasia. *Id.* at 781-82. According to the *Kennedy* court:

The existence of another possible address is not enough by itself to rebut the inference that jurisdiction could not be obtained. . . . [B]ecause the general burden of proof falls on Callanen and Guess as movants under Trial Rule 56 there must be some additional evidence supporting their claim that the second address was a viable means to serve

question in this regard is whether the evidence generated by the Kennedys, although not overwhelming, is enough to create a genuine issue of material fact concerning whether an Indiana court might find a sufficient basis for exercising personal jurisdiction over Interasia. Assuming the answer to that question is “yes,” it does not automatically lead to the conclusion that there is a genuine issue of material fact about whether Callanen and Guess are manufacturers under Indiana Code section 34-20-2-4. Indeed, determining whether they are or are not manufacturers necessarily requires examination of the statute’s second requirement, namely whether those entities are Interasia’s principal distributor or seller.

Merely placing enough evidence in the record to create a fact question on the jurisdiction issue cannot be viewed as by itself sufficient to create a genuine issue of material fact about whether an entity is or is not subject to liability under Indiana Code section 34-20-2-4. A separate analysis, which the *Kennedy* court later employed, is also required to determine whether the entity against whom liability under Indiana Code section 34-20-2-4 is sought is the principal distributor or seller of the product at issue.

In the case of Callanen and Guess, it is undisputed that neither, in fact, manufactured the umbrella.⁵⁶ Moreover, there is no evidence that either of them fit within the statutory definition of Indiana Code section 34-6-2-77(a). Thus, Indiana Code section 34-20-2-4 provides the only basis for applying “strict” liability against them for a manufacturing defect in the umbrella.

Stated plainly, as defendants and summary judgment movants, Callanen and Guess had to designate evidence affirmatively establishing without genuine factual dispute: (1) that they are not Interasia’s principal domestic distributor or seller; or (2) that the court can, indeed, hold jurisdiction over Interasia. If either was unable to do so, summary judgment would be inappropriate and Indiana Code section 34-20-2-4 would allow a basis for a trier of fact to impose strict liability for a manufacturing defect in the umbrella. As it turned out, Callanen did neither. Guess ultimately avoided application of liability under Indiana Code section 34-20-2-4 because it was able to demonstrate without genuine factual dispute that it was not Interasia’s principal domestic distributor or seller.⁵⁷

C. “. . . for physical harm caused by a product . . .”

For purposes of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁵⁸ It does not include “gradually evolving damage to

process on Interasia.

Id. at 782.

56. *Id.* at 780 n.3.

57. *Id.* at 783. The second part of the *Kennedy* decision addressed whether Guess and Callanen could be liable based upon common law theories of liability outside the scope of the IPLA. *See infra* Part I.E.

58. IND. CODE § 34-6-2-105 (2004).

property or economic losses from such damage.”⁵⁹

For purposes of the IPLA, “product” means “any item or good that is personalty at the time it is conveyed by the seller to another party.”⁶⁰ The term does not apply to a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁶¹

A portion of the opinion in the case of *Baker v. Heye-America*,⁶² decided in December 2003, examines whether certain assembly activity resulted in the creation of a “product” under the IPLA. In that case, plaintiff Henry Baker worked at a glass bottle manufacturing facility, operating a machine that was built by defendant Heye-America according to specifications provided by Baker’s employer.⁶³ The machine formed glass bottles from molten glass. To cool the glass, a fan beneath the factory floor funneled wind into the machine through one of several types of wind appliances, including configurations known

59. *Id. See, e.g., Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (finding personal injury and property damage to other property from a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (finding no recovery under IPLA where claim is based on damage to the defective product itself); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (involving a case brought by a couple against a condom manufacturer in which the court denied a motion to dismiss, determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *see also Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830 (S.D. Ind. Apr. 29, 2002) (finding no recovery under IPLA in case involving motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

60. IND. CODE § 34-6-2-114.

61. *Id. E.g., R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 121-22 (Ind. Ct. App. 2001) (holding that manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); *Marsh v. Dixon*, 707 N.E.2d 998 (Ind. Ct. App. 1999) (finding that an amusement ride involved the provision of a service and not the sale of a product); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085-86 (Ind. Ct. App. 1998) (finding that defendant provided products and not merely services because it transformed metal block into “new” products and because it repaired damaged products, both of which created “new,” substantially different work product); *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (finding that installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *see also Great N.*, 2002 U.S. Dist. LEXIS 7830 (involving a fire that destroyed a motor home in which plaintiff insurance carrier attempted to state a claim for negligent inspection against defendant separate and apart from IPLA which the court rejected, determining that no reasonable juror could determine that the allegedly negligent inspection occurred as part of a transaction for “services” separate and apart from the purchase of the motor home).

62. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

63. *Id.* at 1137-38.

as “stacked wind” and “tube wind.”⁶⁴ On November 24, 1998, Baker was utilizing stacked wind to cool the bottles.⁶⁵ He realized that some of the bottles were of uneven thickness, which he attributed to a problem with the amount of wind blowing into the machine.⁶⁶ As he was using his hand to test the wind velocity on the output side of the machine, the mold opened, pinning his hand between the mold and the stacked wind appliance.⁶⁷ Baker and his wife sued Heye-America and Emhart Glass Manufacturing, Inc., the manufacturer of the machine’s control components. The trial court granted summary judgment to both Heye-America and Emhart.⁶⁸ The Bakers appealed.

The first issue raised on appeal was whether Heye-America’s assembly of the machine at issue created a product for purposes of the IPLA.⁶⁹ The designated evidence showed that the machine was rebuilt partially from refurbished parts.⁷⁰ Other evidence showed that Heye-America built the machine for Baker’s employer through an “interactive process” between the two entities.⁷¹ Heye-America apparently employed an engineer but no design professionals.⁷² The director of machine development for Baker’s employer testified that the machine was created and constructed by Heye-America.⁷³ Heye-America’s vice president and general manager testified that such machines are customized to the specifications of the customer and that the person in charge of the assembly shop at Heye-America would have been responsible for refining the specifications when it was rebuilt and assembled.⁷⁴

Relying heavily on *Lenhardt Tool & Die Co. v. Lumpe*,⁷⁵ the *Baker* court

64. *Id.* at 1138.

65. *Id.* at 1137-38.

66. *Id.* at 1138.

67. *Id.*

68. *Id.*

69. *Id.* at 1140.

70. *Id.* at 1141.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 703 N.E.2d 1079 (Ind. Ct. App. 1998). In *Lenhardt*, the Indiana Court of Appeals concluded that a company that machined blocks of metal into molds by following the designs found in specifications from its customer could be considered a manufacturer of a product under the IPLA because the process transformed metal blocks into new products that were substantially different from the raw material used. Because the repair of a damaged mold could be either the creation of a new product or the service of repairing the original product, depending upon the amount of work required, a genuine issue of material fact existed as to whether the alleged defective product had been created or serviced by the defendant. *Id.* at 1085-86. See also *R.R. Donnelly & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112 (Ind. Ct. App. 2001) (using *Lenhardt* analysis to determine that the defendant was a manufacturer under IPLA where it transformed raw material into a new product that was substantially different from the raw material used).

concluded that the machine at issue is a “product” covered by the IPLA.⁷⁶ In support of its conclusion, the court reasoned that the rebuilding process was “a substantial and complicated one that resulted in a complex new machine that was significantly different from its parts.”⁷⁷ According to the *Baker* court: “Heye-America did more than simply provide the service of restoring [the machine] from a damaged condition. Rather, through an interactive process with [Baker’s employer], Heye-America designed and produced a custom product that it placed in the stream of commerce.”⁷⁸

D. “. . . any product in a defective condition unreasonably dangerous . . .”

Only products that are in a “defective condition” are products for which liability may attach pursuant to the IPLA. For purposes of the IPLA, Indiana Code section 34-20-4-1 provides that a product is in a “defective condition” if

at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.⁷⁹

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”); (2) the product lacks adequate or appropriate warnings (a “warnings defect”); or (3) the product has a defect in its design (a “design defect”).⁸⁰

Although claimants are free to assert one of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products, as a matter of law, are not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not

76. *Baker*, 799 N.E.2d at 1141.

77. *Id.*

78. *Id.*

79. IND. CODE § 34-20-4-1(2004). See *Baker*, 799 N.E.2d at 1140 (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.”); *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999).

80. See *First Nat’l Bank v. Am. Eurocopter Corp.*, 378 F.3d 682, 689 (7th Cir. 2004); *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

reasonably expectable, the seller is not liable under [the IPLA].”⁸¹ In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁸²

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of Indiana Code section 34-20-4-1(2). A product is “unreasonably dangerous” only if its use exposes the user or consumer to a risk of physical harm beyond that contemplated by the ordinary user or consumer who purchases it with ordinary knowledge about the product common to consumers in the community.⁸³ A

81. IND. CODE § 34-20-4-3. The most recent case discussing “reasonably expectable use” is an unpublished decision by Judge Larry McKinney. *See* *Hunt v. Unknown Chem. Mfr. No. One*, 2003 U.S. Dist. LEXIS 20138 (S.D. Ind. Nov. 5, 2003). There, Gary Hunt purchased from Furrow Building Materials (“Furrow”) lumber treated with chromium copper arsenate (“CCA”). *Id.* at *2. The chemical treatment waterproofs lumber and protects it from damage from wood-boring insects. *Id.* Hunt used the wood primarily to construct a deck around a swimming pool. *Id.* at *4. Hunt then sold the home to the plaintiffs, who tore down the deck, burned the wood in the backyard, and spread the ashes as fertilizer in the family garden. *Id.* Plaintiffs filed suit after learning “about the dangers resulting from exposure to CCA-treated wood.” *Id.*

Judge McKinney cited Indiana Code section 34-20-4-3 for the proposition that manufacturers (as defined by the IPLA) can only be held liable for injury or damage caused by a product’s reasonably expectable use. *Id.* at *27-28. He also recognized that Indiana cases such as *Wingett v. Teledyne Industries, Inc.*, 479 N.E.2d 51 (Ind. 1985) and *Douglass v. Irvin*, 549 N.E.2d 368 (Ind. 1990), contemplate that some activities or actions relative to a product (demolition of ductwork in that case) are simply not “foreseeable” as a matter of law and, accordingly, are not “intended” or expected uses of the product. *Id.* at *28-29. Applying Indiana law to the facts before him, Judge McKinney recognized that the intended use of the treated wood that Gary Hunt bought from Furrow was the construction of decks and other structures. *Id.* at *31. He did, in fact, use the wood to construct and repair a swimming pool deck. *Id.* at *32. Such use was not, however, the basis of plaintiffs’ claim. Rather, the claims stem from the burning of the treated wood at issue. *Id.* Accordingly, Judge McKinney concluded that “[p]laintiffs’ destruction of the wood and their post-destruction use of the wood ashes as ‘fertilizer’ for the yard were not reasonably foreseeable uses of the product.” *Id.*

82. IND. CODE § 34-20-4-4.

83. *See id.* § 34-6-2-146; *see also* *Baker*, 799 N.E.2d at 1140; *Cole*, 714 N.E.2d at 199. In *Baker*, a 2003 decision, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added). Another panel wrote the same thing in *Vaughn v. Daniels Co.*, 777 N.E.2d 1110, 1128 (Ind. Ct. App. 2002), *clarified on reh’g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003) (citing *Cole*, 714 N.E.2d at 200). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that “reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. . . . The manner of use required to establish ‘reasonably expectable use’ under the circumstances of each case is a matter peculiarly within the

product is not unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.⁸⁴

The “rule of liability” in Indiana Code section 34-20-2-1 provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁸⁵ even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”⁸⁶ What Indiana Code section 34-20-2-1 bestows, however, in terms of liability despite the exercise of “all reasonable care [*i.e.*, fault],” Indiana Code section 34-20-2-2 removes for two of the three operative theories used to show

province of the jury.” 799 N.E.2d at 1140 (citing *Vaughn*, 777 N.E.2d at 1128).

It would be incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is “reasonably expectable.” Indeed, recent cases have resolved the “defective” and “unreasonably dangerous” issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be in the installed position. With respect to his design claims, plaintiff’s expert opined that the saw was “defective” and “unreasonably dangerous” by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* See also *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. Oct. 15, 2002) (finding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time they were introduced into the stream of commerce).

84. See *Baker*, 799 N.E.2d at 1140; see also *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (finding that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “[T]o be unreasonably dangerous, a defective condition must be hidden or concealed . . . [and] evidence of the open and obvious nature of the danger . . . negate[s] a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co., Inc.*, No. TH-01-0237-C-T/H, 2003 U.S. Dist. LEXIS 17177, at **7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 99). In *Hughes*, plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. Plaintiff admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at **3-4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

85. IND. CODE § 34-20-2-1.

86. *Id.* § 34-20-2-2.

a defect. Chapter 2, section 2 eliminates the privity requirement between buyer and seller for imposition of liability and also confirms that a manufacturer's or seller's exercise of reasonable care eliminates liability in cases in which the theory of liability is design defect or warning defect:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.⁸⁷

Indiana courts and commentators routinely have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.⁸⁸ Thus, just as in any other negligence case, a claimant utilizing design or warnings theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁸⁹

Many courts have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.⁹⁰ Even though Indiana is now ten years removed from the 1995 amendments to the IPLA, some courts and practitioners continue to use erroneous language implying that "strict liability" and/or "liability without regard to reasonable care" still applies to cases in which the operative theory of liability is based upon inadequate warnings or improper design.⁹¹

87. *Id.*

88. See *Burt*, 212 F. Supp. 2d at 899-900; Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 999 (1996) ("The effect of [Indiana Code section 34-20-2-3 and section 34-20-2-4] is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer.").

89. See *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 783 (2004).

90. See, e.g., *First Nat'l Bank v. Am. Eurocopter Corp.*, 378 F.3d 682, 689 n.4 (2004) ("Both Indiana's 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles."); *Burt*, 212 F. Supp. 2d at 899-900; *Kennedy*, 765 N.E.2d at 220; *Miller v. Honeywell Int'l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (finding the standard for liability in design defect cases is a negligence standard).

91. The most recent example is found in *Ziliak v. AstraZeneca LP*, 324 F.3d 518 (7th Cir. 2003). Although not relevant to the court's ultimate decision, the *Ziliak* decision proclaimed that "manufacturers are *strictly liable* to consumers for injuries caused by defective or unreasonably dangerous products placed in the stream of commerce." *Id.* at 521 (emphasis added). A few sentences later, the court again incorporated strict liability into its analysis: "AstraZeneca is absolved of *strict liability* so long as it has imparted adequate warnings to treating physicians." *Id.*

In addition, the Indiana Pattern Jury Instructions fail to correctly follow the IPLA in this regard. The pattern jury instructions do not adequately distinguish between the operative theories to which negligence standard should apply (warning defect and design defect) and the operative theory to which a strict liability (“liability without regard to reasonable care”) standard should apply (manufacturing defect). Specifically, Pattern Instruction 7.04 does not track the language of Indiana Code section 34-20-2-2, which requires an IPLA claimant utilizing a design or warning defect theory to establish that “the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.”⁹²

1. *Warning Defect Theory*.—The IPLA contains a specific statutory provision covering the warning defect theory; it states that:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.⁹³

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.⁹⁴

Indiana courts have been active in recent years in resolving cases espousing warning defect theories.⁹⁵ The latest warning defect theory case comes from the

(emphasis added). In support of its assumption of strict liability, the *Ziliak* court cites Indiana Code section 34-20-2-1. *Id.*

Because *Ziliak*’s cause of action accrued in November 1998, there is no question that the case is governed by the current version of the IPLA, which was enacted in 1995. Although, as the *Ziliak* court recognized, it is true that the “rule of liability” established by Indiana Code section 34-20-2-1 applies even though a seller has exercised all reasonable care in the manufacture and preparation of the product (the rule of strict liability), Indiana Code section 34-20-2-2 eliminates the rule of liability without regard to reasonable care in all cases in which the theory of liability is inadequate warnings or improper design.

Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396, 405-06 (Ind. Ct. App. 1999), is a case in which the Indiana Court of Appeals found no error in the trial court’s use of the term “strict liability” in its instructions to the jury even though the case was not limited to manufacturing defects.

92. IND. CODE § 34-20-2-2 (2004).

93. *Id.* § 34-20-4-2.

94. *First Nat’l Bank*, 378 F.3d at 690 n.5.

95. In *Birch v. Midwest Garage Door Systems*, 790 N.E.2d 504 (Ind. Ct. App. 2003), a young girl sustained serious injuries when the door of the garage closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. The court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type

Seventh Circuit, *First National Bank & Trust Corp. v. American Eurocopter Corp.*⁹⁶ There, a helicopter rotor blade struck and killed Conseco general counsel Lawrence Inlow. The accident occurred as he passed in front of the helicopter after disembarking at the Indianapolis International Airport.

The helicopter involved was a Dauphin, manufactured by Eurocopter, a French corporation. At normal flight speeds, the helicopter's rotor blades are subject to centrifugal and lifting forces that raise the plane of the disk in which the blades rotate.⁹⁷ When the blades are not moving, they droop to about eight feet, two inches above ground level in front of the helicopter. When the blades are under power and the pilot's cyclic control⁹⁸ is in the neutral position, the blades may rise as high as nine feet, four inches above ground level in front of the helicopter.⁹⁹ The height of the rotor blades are marketed to Eurocopter's customers¹⁰⁰ as a safety feature and a convenience. There are, however, two

of system installed and that no additional information about garage door openers would have added to the plaintiffs' understanding of the characteristics of the product. *Id.* at 518-19.

In *Ziliak*, plaintiff developed glaucoma after taking a prescribed inhaled corticosteroid. The package inserts provided a warning that "rare instances of glaucoma, increased intraocular pressure, and cataracts have been reported following the inhaled administration of corticosteroids." 324 F.3d at 519. The district court granted summary judgment, finding that the manufacturer could not be held liable for plaintiff's injuries under Indiana's "learned intermediary" doctrine and because the warning accompanying the product was adequate as a matter of law. *Id.* at 520. The Seventh Circuit agreed that the warning was adequate as a matter of law and, accordingly, did not address the learned intermediary basis for the district court's decision. *Id.* at 520-21. In doing so, the Seventh Circuit recognized that some products, including pharmaceuticals, are "unavoidably unsafe" in that they are incapable of being made completely safe for their intended or ordinary use. *Id.* at 521 (citing *Moss v. Crosman Corp.*, 136 F.2d 1169, 1171 (7th Cir. 1998)). The court also pointed out that such products, properly prepared and accompanied by proper directions and warnings, are not defective, nor are they unreasonably dangerous. *Id.* (citing *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 545-46 (Ind. App. 1979)). See also *Burt*, 212 F. Supp. 2d at 901-02 (rejecting argument that saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared installed when in fact it was not and finding there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances since the scope of the duty to warn is determined by the foreseeable users of the product); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096, 1104 (Ind. Ct. App. 2001) (concluding that because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process, the trial court should have addressed whether the risks associated with use of product were unknown or unforeseeable and whether or not the defendants had a duty to warn of the dangers inherent in the use of the product).

96. 378 F.3d 682 (7th Cir. 2004).

97. *Id.* at 685.

98. The pilot grips the cyclic control with his right hand and thereby controls the degree of tilt in the rotor disk. *Id.* at 685.

99. *Id.*

100. Eurocopter's primary customers are business executives, medical personnel, law

ways in which the high-set rotor is counteracted: (1) when the pilot maneuvers the cyclic control to tilt the rotors¹⁰¹ and (2) when the blades flex up and down due to wind gusts or at lower revolutions-per-minute.¹⁰² Thus, as the *Inlow* court noted, “despite the high-set rotor . . . the Dauphin rotor blades pose grave danger to anyone within the circular path of the blades. . . . Notwithstanding the dangers of disembarking while the rotors are decelerating, Eurocopter did not directly warn anyone at Consecos of such risks.”¹⁰³ No such warnings were in the helicopter, and none were in the instruction manual.¹⁰⁴

After Consecos bought the Dauphin, its head of flight operations implemented what the court called an “imprudent disembarkation procedure that was concerned more with saving executive time and the level of engine noise than safety.”¹⁰⁵ Consecos CEO Stephen Hilbert “did not want to delay disembarking for the thirty-to-forty seconds it takes for the rotor blades to fully stop with the engines off, nor did he want to depart while the engines were running because the noise was extremely loud.”¹⁰⁶ Accordingly, Consecos developed a debarking policy that would allow passengers to exit the Dauphin after the engines had been shut down, but before the rotor blades had completely stopped.¹⁰⁷ Consecos pilots required passengers to exit the helicopter at a 90-degree angle to the helicopter so as to prevent them from stepping into the “most dangerous sector of the blades’ arc-in front of the helicopter.”¹⁰⁸

The Consecos pilots were well aware of the risks inherent in exiting a helicopter while the blades were decelerating.¹⁰⁹ In fact, the pilot on the day of the accident had overruled the Consecos policy when wind gusts were particularly strong. “Several pilots and mechanics also complained to their Consecos superiors on occasion about the practice.”¹¹⁰ Although uncomfortable with procedures because of their “general inclination toward taking all conceivable precautions,” the Consecos pilots confirmed that “this discomfort did not stem from any warnings issued by Eurocopter” but rather from “knowledge that ‘there was a potential for endangerment of passengers or personnel’” derived from “‘intuit[ion] or from military experience,’ not specific knowledge of how low the

enforcement, and offshore oil platform operators. *Id.*

101. Tilting the rotors enables the helicopter to move in the direction of the tilt. *Id.* When the cyclic is pushed to its absolute maximum forward position of thirteen degrees, the rotor blade can reach as low as five feet, two inches from the ground. *Id.*

102. The rotor blades are subject to “blade flap” because they are made of a non-rigid, lightweight carbon fiber material. *Id.* at 686.

103. *Id.* at 686-87.

104. *Id.* at 687.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

Dauphin blades actually could bend.”¹¹¹ Inlow was a frequent passenger on the Dauphin for five years before the fatal accident and had been warned “more than once” by pilots about walking in front of the Dauphin.¹¹² On the day of the accident, Inlow began to walk on roughly the correct path, then abruptly turned and walked fully upright in front of the helicopter into the path of the blades.¹¹³ The blades struck him at about the one o’clock position off the nose of the helicopter.¹¹⁴

The representative of the Inlow Estate sued Eurocopter, claiming it had failed to warn Inlow and Consecos about the danger of the rotating rotor blades. The district court granted Eurocopter’s motion for summary judgment on three grounds:

- (1) that the danger that befell Inlow was open and obvious and therefore Eurocopter did not have a duty to warn Consecos or Inlow of the danger;
- (2) that, even assuming the danger was not open and obvious because of the increased risk of blade flap during deceleration, the pilots in the employ of Consecos served as sophisticated intermediaries who relieved Eurocopter of the duty to warn Consecos or Inlow; and
- (3) that the Dauphin was not “unreasonably dangerous” under the [IPLA] and therefore the Inlow Estate could not proceed with the suit.¹¹⁵

The Seventh Circuit panel first recognized Indiana’s duty to warn reasonably foreseeable users of all latent dangers inherent in the product’s use.¹¹⁶ The court

111. *Id.*

112. *Id.* at 688. On one prior occasion, Inlow walked to the same spot where he was later killed. *Id.* A Consecos pilot told him that it looked as if the blade came close to hitting him and that he needed to follow the exit procedure. *Id.* “Inlow acknowledged his understanding.” *Id.* On another occasion, Inlow was stopped before he could walk towards the front of the helicopter and was asked to proceed along the ninety degree exit path. *Id.*

113. *Id.*

114. *Id.* The pilot manning the controls in the cockpit said that nothing appeared to be unusual about the rotor blade path. *Id.* He testified that “it appeared that Inlow simply walked into the path of the blades, a place [the pilot] never expected anyone to be.” *Id.* The pilot’s testimony on that point is as follows:

Now, I know mentally that this thing is supposed to be eight feet tall. Larry is six feet tall. I can’t tell you where that two feet went. I know from my observation watching this thing spool down everything was correct. The cyclic was where it was—normally was. I was guarding it with my hand. The tip path plane was where it should have been. No vibrations. Everything looked good. Next thing I know I see Larry [Inlow] coming out of my peripheral vision. Now I’ve got something of a sight picture. I can see Larry’s not going to make it.

Id. at 688 n.2.

115. *Id.* at 688.

116. *Id.* at 690. Although not dispositive with respect to Eurocopter’s ultimate legal culpability, the *Inlow* court took the opportunity at the outset of its failure to warn discussion to point out that:

then recognized that there is no duty to warn of open and obvious dangers because a warning would be redundant.¹¹⁷ Thus, the first question the *Inlow* court identified was whether the danger presented by the Dauphin's rotor blades was open and obvious and, therefore, not latent or hidden.¹¹⁸ On that question, the court recognized that the dangers presented by rotors on some helicopters may be so obvious that no warning would be necessary or helpful.¹¹⁹ According to the court, however, it is not obvious that the Dauphin's high-set rotor provides reliable safety for exiting passengers only when it is turning at flight speed; this could lead to a "false sense of security in its users" who might buy it because of a perceived level of safety for inexperienced passengers.¹²⁰ As a result, the court determined as a matter of law that "[d]eceleration-enhanced blade flap is a hidden danger of the Dauphin for which Eurocopter had a duty to warn its customers, in this case, Consecos."¹²¹

The remainder of the court's opinion on the warning defect issue addressed whether Eurocopter breached that duty. Stated more plainly, "did Eurocopter adequately warn and/or instruct Consecos and Inlow on the dangers of the Dauphin and/or the proper use of the helicopter?"¹²² On that point, the district court held that Eurocopter satisfied its duty to warn as a matter of law in light of the sophisticated intermediary doctrine.¹²³ Indeed, although the duty to warn end users of potential dangers is usually not delegable, Indiana law recognizes the sophisticated intermediary (sometimes called the "learned intermediary")

There are many who could be blamed for this terrible accident. For one, Consecos did not thoroughly consider flight safety. Its executives could have investigated the best way to disembark, given more deference to the judgment of the helicopter pilots within the organization, or ensured that ground crews were present at every disembarkment. Second, the pilots could have reminded Inlow of the proper, 90-degree exit path, physically forced him to walk this path in light of his past behavior, or insisted that their instincts on flight safety should have been followed despite Consecos's flight policy. And, of course, Inlow himself decided to walk upright, directly in front of the helicopter.

Id.

117. *Id.*

118. *Id.*

119. *Id.* at 691. The example the court gave of a helicopter with a lower rotor set was the Sikorsky S-76, which, according to the court, has a rotor set at body height. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* The court acknowledged that the sophisticated intermediary doctrine is similar to the sophisticated user exception to the duty to warn under Indiana law. *Id.* at 691 n.8 (citing *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 403 n.4 (Ind. Ct. App. 1999)). The court expressed difficulty in determining whether Inlow, as an individual passenger, is the end user of the product or whether Consecos, as an organization, is the end user. In resolving that quandary, the court wrote, "[w]e are inclined towards the former and therefore analyze the issue as a sophisticated intermediary case rather than a sophisticated user case." *Id.*

exception.¹²⁴ The doctrine applies if: "(1) the product is sold to an intermediary with knowledge or sophistication equal to that of the manufacturer; (2) the manufacturer adequately warns this intermediary; and (3) the manufacturer can reasonably rely on the intermediary to warn the ultimate consumer."¹²⁵ Additional factors should be considered as well, including:

The likelihood or unlikelihood that harm will occur if the intermediary does not pass on the warning to the ultimate user, the [] nature of the probable harm, the probability or improbability that the particular intermediary will not pass on the warning[,] and the ease or burden of the giving of the warning by the manufacturer to the ultimate user.¹²⁶

Simply put, if the foregoing conditions are satisfied, a manufacturer is deemed not to have breached its duty to warn.

In the *Inlow* case, the court was satisfied that the evidence supported a finding as a matter of law that the sophisticated intermediary doctrine applies to bar failure to warn liability. The evidence important to the court to sustain the judgment included the following points: (1) Consecos licensed, trained, professional staff of pilots understood the dangers of blade flap and that exiting the Dauphin while the blades decelerated posed significant dangers; (2) because information about blade flap was readily available to the Consecos pilots in their training and in materials familiar to them as professional pilots, any lack of direct warning by Eurocopter to the pilots would have been inconsequential; and (3) it was more than reasonable for Eurocopter to expect the pilots to pass on the warning to the Consecos executives.¹²⁷

In conclusion, the court wrote:

Inlow was directly warned more than once that tragedy could strike if he persisted in walking in front of the Dauphin when disembarking. The fact that Consecos and Inlow chose to ignore admonishments from the professional pilots does not alter the fact that the pilots are sophisticated intermediaries. No jury could find that it was unreasonable for Eurocopter to expect Consecos's pilots to understand rotor blade dangers and to protect Consecos passengers from those dangers. . . . [W]e agree with the district court in adding that Eurocopter may not be held liable as a matter of law under Indiana's sophisticated intermediary doctrine.¹²⁸

Because of the court's finding relative to the sophisticated intermediary doctrine,

124. *Id.* at 691.

125. *Id.*

126. *Id.* at 692 (quoting *Ritchie v. Glidden Co.*, 242 F.3d 713, 724 (7th Cir. 2001)).

127. *Id.* at 692-93. By way of illustration, the court pointed out that there were several industry sources recognizing the dangers presented by exiting or approaching a helicopter when the rotors were spinning, including a 1983 Federal Aviation Administration circular, Indiana's occupational safety regulations, the Safety Manual of the Helicopter Association International, and a 1992 training book entitled "Learning to Fly Helicopters." *Id.* at 692.

128. *Id.* at 693.

the court did not analyze the issue of proximate cause or the defense of incurred risk.¹²⁹

2. *Design Defect Theory*.—Indiana courts require plaintiffs in cases utilizing a design defect theory to prove what practitioners and judges often refer to as a “safer, feasible alternative” design. Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹³⁰ Judge Easterbrook has described that a design claim in Indiana is a “negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accident.”¹³¹

Indiana’s requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.¹³² In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard. As such, one could hardly find a manufacturer negligent for adopting a particular design unless one could prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. That necessarily means that the claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability.¹³³

In addition, the IPLA adopts comment k of the Restatement (Second) of Torts for all products and, by statute, “a product is not defective . . . if it is

129. *Id.* According to Judge Hamilton at the district court level, the helicopter was not “unreasonably dangerous” because, as a matter of law, it did not place Inlow at risk of injuries different in kind from those the average user might anticipate.

130. *See Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995). The plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff’s expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. 212 F. Supp. 2d at 900. The court rejected the claim, holding that the plaintiff has “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* *See also* *Miller v. Honeywell Int’l Inc.*, No. IP98-1742-CMIS, 2002 U.S. Dist. LEXIS 20478, at *66 (illustrating the recognition of plaintiffs that design defect theory required proof of an alternative design that was effective, safer, more practicable, and more cost-effective than the one at issue).

131. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

132. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

133. By way of example, a manufacturer could not be held liable under the IPLA for adopting design “A” unless there was proof that through reasonable care the manufacturer would have instead adopted design “B.” To make that case, a claimant must show the availability of design “B” as an evidentiary predicate to establish that element first before proceeding to the other “reasonable care” elements.

incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”¹³⁴ As such, a manufacturer technically cannot make the “comment k” statutory defense available until and unless the claimant demonstrates a rebuttal to it. That raises interesting questions in light of Indiana’s quirky treatment of Rule 56¹³⁵ since *Jarboe v. Landmark Comm. Newspapers of Indiana, Inc.*¹³⁶ In federal court under a *Celotex*¹³⁷ standard, a manufacturer may file a summary judgment motion based upon the “comment k” defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana’s treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design. Nevertheless, and regardless of the procedure governing the motion itself, the claimant still must prove safer, feasible alternative design to rebut the IPLA’s “comment k” defense.

The *Baker v. Heye-America*¹³⁸ case is the Indiana Court of Appeals’ most recent published foray into the substantive world of defective design theory. Plaintiff Henry Baker injured his hand while operating a glass bottle manufacturing machine.¹³⁹ The machine formed molten glass into bottles by closing around them and then opening again.¹⁴⁰ The moving parts that form the bottles are referred to in the opinion as both “molds” and “blanks.”¹⁴¹ To cool the glass, a fan beneath the factory floor funneled wind into the machine through one of several types of wind appliances, including configurations known as “stacked wind” and “tube wind.”¹⁴² Baker realized that some of the bottles were of uneven thickness, which he attributed to a problem with the amount of wind blowing into the machine.¹⁴³ As he was using his hand to test the wind velocity on the output side of the machine, the mold opened, pinning his hand between the mold and the stacked wind appliance.¹⁴⁴

The Bakers alleged five ways in which they believed the glass molding machine was defective: (1) improper placement of the maintenance stop button; (2) lack of a guard on the maintenance stop button; (3) no practical release option was offered by the design if a person became trapped by the open mold; (4) the lack of a gauge for determining wind velocity, which required operators to test wind speed with their hands; and (5) placement of the basic wind

134. IND. CODE § 34-20-4-4 (2004).

135. IND. TRIAL R. 56.

136. 644 N.E.2d 118 (Ind. 1994).

137. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

138. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

139. *Id.* at 1138.

140. *Id.*

141. *Id.* at 1138 n.1.

142. *Id.* at 1138.

143. *Id.*

144. *Id.*

configuration.¹⁴⁵

It is important to point out that the plaintiffs specifically disavowed their intent to proceed on a warnings defect theory. According to the court, it considered “only whether the designated materials raise an issue of fact with regard to design or manufacturing defects.”¹⁴⁶ In reality, however, all of the operative theories upon which the plaintiffs proceeded in *Baker* are defective design theories. None of the theories, as stated, allege a defect in the manufacturing process because they espouse no problem with the functionality of the equipment or its failure to operate as designed. Rather, all theories allege risks created by the improper positioning and/or lack of operational, control, or safety mechanisms.

The Bakers alleged two defects related to the maintenance stop button. First, they claimed that stop button was located where it could be inadvertently activated by a worker’s knee.¹⁴⁷ Second, they alleged that it should have been designed with a guard.¹⁴⁸ With respect to the first theory, the court immediately recognized that “the designated evidence shows some disagreement about whether the maintenance stop button even played a role in Baker’s accident.”¹⁴⁹ Based upon the configuration and operation of the machine at the time Baker’s hand was freed, Baker’s supervisor testified that the maintenance stop button had been activated.¹⁵⁰ Baker himself, however, testified that he was certain he did not activate the maintenance stop button.¹⁵¹ Rather, he testified that he was properly positioned but the blanks opened prematurely because of an electrical malfunction. Baker also testified, contrary to his supervisor, that the machine shut down while he was trapped and that his co-workers had trouble getting the machine restarted after the accident.¹⁵² In addition, witnesses offered several conflicting opinions about why the blanks opened, including activation of the stop button, an electrical malfunction, faulty computer cards, power failure, and a mechanical failure in a hose or valve line or valve assembly.¹⁵³

After summarizing all of the various factual disagreements, the court concluded that there was “a genuine issue of material fact with regard to whether Baker even activated the maintenance stop button, and if so, whether its

145. *Id.* at 1141-42.

146. *Id.* at 1140.

147. *Id.* at 1142.

148. *Id.* at 1143.

149. *Id.*

150. *Id.* Baker’s supervisor freed Baker’s hand by releasing the stop button and activating two start buttons, causing the machine to cycle and, in turn, the blank to close. *Id.* Baker’s supervisor deduced that the stop button had been activated because each section of the machine has its own maintenance stop button and, that during Baker’s accident, the other sections of the machine continued to operate. *Id.* Baker’s supervisor testified that a computer failure would have shut down the entire machine and if the machine had “broken,” it would not have been possible to restart. *Id.*

151. *Id.* at 1142.

152. *Id.*

153. *Id.* at 1142-43.

placement or its lack of a guard rendered [the machine] unreasonably dangerous.”¹⁵⁴ The court then pointed to additional issues of material fact in the designated evidentiary materials. Among the additional evidence was the testimony of Heye-America’s vice president and general manager, who explained that the maintenance stop button could be placed in other places.¹⁵⁵ The director of machine development for Baker’s employer also testified that he did not know if it would be feasible to locate the button higher up on the machine and that, in any event, he left it to Heye-America to design the machine from his basic instruction.¹⁵⁶

With regard to the placement of a guard over the button, both Baker and his supervisor testified that there originally was a guard on the maintenance stop button but that it had become loose and was not covering the button, thus allowing inadvertent activation.¹⁵⁷ Although representatives of Heye-America and Ball Foster (Baker’s employer) acknowledged that guards were available for the buttons, they appeared to disagree about which entity was responsible for the lack of a guard.¹⁵⁸ Regardless, evidence was elicited that “there are advantages to both having a guard and opting not to have one, because a guard might make the button less accessible when it needed to be activated in an emergency.”¹⁵⁹

In light of the conflicting evidence, the court concluded as follows:

In summary, the evidence shows that the maintenance stop button could have been located in a different place. . . . However, it also demonstrates significant disagreement among the witnesses with regard to whether Ball Foster or Heye-America determined the location of the button and whether it would have a guard. The witnesses also provided contradictory evidence about whether the lack of a guard rendered the machine unreasonably dangerous. . . . These genuine issues of material fact preclude summary judgment on these theories.¹⁶⁰

Two of the jury questions related directly to causation. Indeed, whether Baker activated the maintenance stop button is a cause-in-fact question. The second question—which company was responsible for the location of the button and the existence of a guard—simply endeavors to impose liability on the proper defendant. The two remaining questions are more substantive in terms of operative product liability IPLA theories: (1) whether placement of the maintenance stop button was a design defect that rendered the machine unreasonably dangerous and (2) whether the lack of a guard was a design defect that rendered the machine unreasonably dangerous.

One other aspect of the first part of the court’s decision bears further

154. *Id.* at 1143.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1143-44.

discussion. The court pointed out in its summarizing paragraph that there was evidence to the effect that “the maintenance stop button *could have been* located in a different place.”¹⁶¹ Although the opinion does not discuss the point, practitioners should be aware that such evidence, by itself, does not and cannot establish the basis for a jury question on the issue of design defect. A product liability claimant in Indiana must come forward with evidence establishing a safer, feasible alternative design that would have reduced the risk of injury.¹⁶² In doing so, claimants must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹⁶³ Judge Easterbrook’s gauge for “feasibility” examines whether a manufacturer “fail[ed] to take precautions that are less expensive than the net costs of [the] accident.”¹⁶⁴

Applied to the situation in *Baker*, the fact that the maintenance stop button *could have been* located in a different place is only part of the equation. *Baker* must also establish that the alternative design could have prevented the injury and was effective, safer, more practicable, and more cost-effective than the one used. Similarly, the fact that the machine could have been designed with a guard over the button is not, by itself, sufficient to demonstrate an unreasonably dangerous design defect. Again, *Baker* must establish that an alternative design employing a guard could have prevented the injury and was effective, safer, more practicable, and more cost-effective than a design that did not incorporate a guard.

As noted above, in light of Indiana’s *Jarboe* summary judgment standard, the manufacturer must designate evidence to affirmatively demonstrate that the plaintiffs’ alternative proposed design, as a matter of law, could not have prevented the injury, and was ineffective, not safer, less practicable, and less cost-effective than the one used.¹⁶⁵ In *Baker*, summary judgment does not appear warranted on this point based upon the evidence discussed in the opinion because such evidence did not affirmatively establish entitlement to summary judgment on each of those points.¹⁶⁶

161. *Id.* at 1143.

162. *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

163. *Whitted*, 58 F.3d at 1206; *Burt*, 212 F. Supp. 2d at 900.

164. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

165. Summary judgment may be difficult to obtain if plaintiffs are able to designate contrary evidence, likely from opinion witnesses, that the “feasibility” of the alternative design is disputed and should be resolved by the jury unless the court finds that, as a matter of law, no reasonable jurors could disagree with the defendants’ position.

166. The only evidence discussed in the opinion relative to the feasibility of the location of the stop button was the testimony of Ball Foster’s director of machine development, who said that “he did not know if it would be feasible to locate the button higher up on the machine.” 799 N.E.2d at 1143. Such equivocation is insufficient to satisfy a movant’s summary judgment burden in Indiana.

With respect to the feasibility of designing the machine without a guard over the maintenance

The Bakers next contended that the machine was defective because it did not have a device that would enable one trapped in Baker's position (between the blank and the stacked wind appliance) to escape.¹⁶⁷ It was uncontroverted that no such release mechanism existed. The evidence demonstrated that "activation of the maintenance stop button caused the machine to open, and there is no button that would cause the machine to close."¹⁶⁸ The evidence also demonstrated that after Baker became trapped, he was unable to restart the machine because it had a two button start mechanism and no release mechanism inside the machine.¹⁶⁹ Heye-America's vice president and general manager testified that Baker's accident, in which his right hand was trapped on the left side of the machine, was a "very peculiar accident" that would not have been anticipated.¹⁷⁰ He also "opined that the more common safety concern would be providing a mechanism for freeing a worker's hand that was trapped in the closed, not the open, mold."¹⁷¹

The specific jury question that seems to remain in light of the foregoing evidence is whether the circumstances of Baker's injury presented a sufficient risk of injury so as to require a reasonable manufacturer to design the machine in the suggested alternative fashion. The manufacturer's designated evidence (at least that which is discussed in the opinion) challenged whether the circumstances of Baker's injury presented a sufficient risk of harm so as to require a design incorporating the kind of escape mechanism suggested by Baker and his expert. As was the case with the maintenance stop button, there was no discussion about the feasibility of the proposed alternative design or any of the points required to demonstrate a feasible alternative design.

Finally, the Bakers argued that the machine was defective because it did not include a gauge by which an operator could obtain wind measurements and adjust settings "in a way that did not require the operator to place his hand into the moving machinery components."¹⁷² In a related argument, the Bakers contended that the machine was defective because it "permitted a pinch point to be created between the machine and the blank when the blank was in [the] open position."¹⁷³

Baker's affidavit testimony stated that "to adjust the velocity of the wind injected onto the blank, the operator had to place his or her hand into the machine

stop button, the only evidence in the opinion was the testimony of Ball Foster's director of machine development, who explained "that there are advantages to both having a guard and opting not to have one, because a guard might make the button less accessible when it needed to be activated in an emergency." *Id.* at 1143. Such evidence would seem to carry a moving party's summary judgment burden with respect to "feasibility" only in the absence of any contrary evidence.

167. *Id.* at 1144.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

to measure the force of the wind.”¹⁷⁴ When in the open position, however, the blank was “so close to the stacked wind appliance that it created an unguarded pinch point.”¹⁷⁵ According to Heye-America, it does not “build machines that require the operator to stick his . . . hand inside.”¹⁷⁶ Rather, its machines utilize a portable magnahelic gauge that measures air pressure.¹⁷⁷ Moreover, according to Heye-America, there is no way to attach a permanent magnahelic gauge to a machine.¹⁷⁸

Designated evidence also revealed that operators historically checked wind speed with their hands, although current practice required them to use a portable gauge and not their hands.¹⁷⁹ A portable gauge was available to Baker to check the wind on the machine at issue.¹⁸⁰ Though workers were required to use a portable gauge, there was evidence that plant personnel knew operators often checked the wind with their hands.¹⁸¹ Indeed, several of Baker’s co-workers testified that this was the only way to check the wind on the blank side of the machine at issue and that a portable gauge would not have worked under the circumstances.¹⁸² Contrary to the co-workers’ testimony, however, one of the experts opined that a portable gauge could have been used to check the wind under the circumstances and that checking the wind with one’s hand is dangerous.¹⁸³ Baker himself testified that he used a portable gauge to check the wind on the front side of the machine, but was never trained on how to use a gauge to check the wind on the output side of the machine.¹⁸⁴

The court held that the designated evidence

show[ed] a genuine issue of material fact with regard to whether a magnahelic gauge could have been used to measure the wind flow in the problem area of [the machine at issue] and whether Heye-America knew or reasonably should have known that the machine operators customarily

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1144-45.

179. *Id.* at 1145.

180. *Id.*

181. *Id.*

182. *Id.* Co-workers also testified that other workers had previously caught their hands in the machines. *Id.* With respect to the feasibility of designing the machine without a guard over the maintenance stop button, the only evidence in the opinion was the testimony of Ball Foster’s director of machine development, who explained “that there are advantages to both having a guard and opting not to have one, because a guard might make the button less accessible when it needed to be activated in an emergency.” *Id.* at 1143. Such evidence would seem to carry a moving party’s summary judgment burden with respect to “feasibility” only in the absence of any contrary evidence.

183. *Id.* at 1145.

184. *Id.*

placed their hands inside the machine to gauge the wind.¹⁸⁵

The court's opinion nicely summarizes all of the disputed evidence and surmises from all the disputed evidence that fact questions preclude entry of summary judgment. Those determinations appear justified based upon the evidence set forth in the opinion. Operating within the specific framework of the IPLA, the threshold questions under these facts are whether operation of the machine without a portable gauge is (1) a use that is reasonably expectable and (2) not unreasonably dangerous. On these points, there is conflicting evidence, particularly with regard to the ability to use a portable gauge to properly test wind speed on the blank side of the machine at issue. It is also possible that another question is implicated, namely whether it was safer and still, in fact, feasible for a permanent or a different portable gauge to be used to measure wind speed on the blank side in such a way as to eliminate the need for an operator to place his hand into moving machinery.¹⁸⁶

Another important design defect case published during the survey period is *Lytle v. Ford Motor Co.*¹⁸⁷ There, the Indiana Court of Appeals held, among other things, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not scientifically reliable.¹⁸⁸ The court also held that the designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous.¹⁸⁹

Lytle, his wife, and his daughter were involved in a rollover accident while riding in a 1987 Ford Ranger pickup.¹⁹⁰ Although Lytle contended that his wife was wearing her seatbelt at the time of the accident, his wife was thrown from the truck and suffered permanent brain damage.¹⁹¹ Lytle contended in his complaint that Ford's defectively designed seat belts caused his wife's enhanced injuries.¹⁹² Lytle originally offered two specific design defect theories: first, that the seat belt buckle inertially released because of acceleration forces that occurred during the accident, and, alternatively, that improper placement of the seat belt buckles combined with the ease of release caused it to inadvertently release.¹⁹³ After Ford moved to exclude evidence of any design defects other than those relating

185. *Id.*

186. In connection with the feasibility analysis, it is important to recognize that the manufacturer designated evidence that it was impossible to add a permanent gauge to the machine at issue. No contrary evidence was identified in the opinion. On the record as it appears in the opinion, it would appear as though the manufacturer would be entitled to summary judgment on the narrow issue of whether attaching a permanent gauge may be used to support a design defect theory.

187. 814 N.E.2d 301 (Ind. Ct. App. 2004).

188. *Id.* at 302.

189. *Id.*

190. *Id.* at 304.

191. *Id.*

192. *Id.*

193. *Id.* at 305.

to inadvertent release, inertial release, or defects in the passenger door, Lytle's attorney informed the court that Lytle's only design "issue" was the selection of the buckle at issue compared to other safer alternative designs.¹⁹⁴ As such, the trial court granted Ford's motion, "concluding that the only issues remaining concerned the buckle's design and selection and Ford's failure to properly test the buckle."¹⁹⁵

The trial court also excluded testimony offered by Lytle's opinion witnesses with respect to inertial and inadvertent release, finding that the testimony was not scientifically reliable and would not assist the trier of fact.¹⁹⁶ Without those two witnesses, the trial court granted summary judgment to Ford because Lytle was unable to establish a genuine issue of material fact regarding design defect and causation.¹⁹⁷ In doing so, the court concluded that Lytle had abandoned his claim for inadvertent release.¹⁹⁸ The Indiana Court of Appeals reversed the trial court's initial grant of summary judgment, holding, among other things, that the trial court erred in determining that Lytle had abandoned his theory of inadvertent release.¹⁹⁹

Following the first appeal, Ford sought another summary judgment and to exclude the expert testimony of Lytle's inadvertent release opinion witnesses.²⁰⁰ The trial court excluded several of Lytle's exhibits and affidavits and, again,

194. *Id.*

195. *Id.*

196. *Id.* One of Lytle's opinion witnesses was Billy Peterson, who offered testimony about inertial release. *Id.* The trial court concluded that Peterson "could not show that the forces and circumstances which were present during his pendulum tests and which permitted the seat belts to inertially release, were sufficiently similar to the forces and circumstances which are present in a 'real world' accident, or which were present during the Lytle's [sic] accident." *Id.* Lytle's other opinion witness, John Marcosky, offered testimony about both inadvertent and inertial release. *Id.* The trial court excluded Marcosky's testimony as well. *Id.*

197. *Id.* at 306.

198. *Id.*

199. *Id.*

200. *Id.* Lytle's opinion witnesses were Billy Peterson (the same witness whose testimony about inertial release was excluded) and Thomas Horton. Peterson subsequently died and was replaced as an opinion witness by Dr. Anil Khadikar. *Id.* Ford argued that testimony from its own opinion witnesses established that the seatbelt assemblies were not defectively designed and that Lytle failed to present any contrary evidence. *Id.* Ford also argued that it was entitled to summary judgment on the issue of negligence and design defect because the testimony of Lytle's opinion witnesses was inadmissible and scientifically unreliable. *Id.* Even if Lytle's opinion testimony could be admitted, Ford nevertheless contended that it was entitled to summary judgment because "Lytle failed to put forth any evidence demonstrating that the seatbelt assemblies were defective or that feasible, safer and more practical designs were available and would have afforded better protection." *Id.* Finally, Ford asserted that Lytle's designated evidence failed to establish alternative designs that could have prevented the injury and that the injuries alleged were proximately caused by the seatbelt assemblies. *Id.*

entered summary judgment for Ford.²⁰¹ In so determining, the trial court found that the seatbelt was in fact latched and in the proper position and that the causal link between the design defect and the injury alleged also had to be established by scientific evidence.²⁰² The trial court also noted that neither of Lytle's inadvertent release opinion witnesses performed any testing and that "there was no credible expert testimony that was based on reliable scientific principles that their theory could work in the real world and was what, in fact, occurred in Lytle's vehicle."²⁰³ With respect to the theory of inadvertent unlatch, the trial court observed that "there are no reported publications, no reported experiments or testing demonstrating that inadvertent unlatch as claimed by Lytle occurs in the real world."²⁰⁴

After an excellent discussion about the gatekeeping function performed by Indiana courts under Rule 702 of the Indiana Rules of Evidence,²⁰⁵ the *Lytle* court affirmed the exclusion of both of Lytle's inadvertent release opinion witnesses. With respect to the first witness, Thomas Horton,²⁰⁶ the court wrote as follows:

[I]t is apparent from the record that Horton simply twisted and pushed two seatbelts together without any evidence that the accident could have resulted in the same forces, direction, duration, rotations, or load conditions as his manipulations. Ford says—and we agree—that proof of "inadvertent unlatch" should require a specific scientific analysis, the same as we required with regard to the theory of "inertial release." . . . [W]e agree with the trial court's conclusion that Horton's testimony also had to be excluded. In our view, the *possibility* that an inadvertent unlatch occurred in this accident depends on a similar convergence of all of the variables addressed above: a particular direction of movement and rotation of the belt assemblies, coupled with the proper force and webbing load, all for the appropriate duration. Put another way, given the evidence in this record, we cannot see how the convergence of all

201. *Id.* at 306-07.

202. *Id.*

203. *Id.*

204. *Id.*

On the other hand, the trial court concluded that Ford's witnesses documented their testing, demonstrated that their theories, tests, and techniques can be repeated and replicated, that findings have been published with regard to this case, and that the methodology that they followed is well-accepted in the technical and scientific community concerned with automobile safety issues.

Id.

205. IND. EVID. R. 702.

206. Horton's testing procedures involved replacing "the buckles with end release buckles and confirm[ing] that, with those types of buckles, any contact would not involve contact with the pushbutton of the outboard passenger's end release buckle." *Lytle*, 814 N.E.2d at 310-11. Accordingly, Horton maintained that "the design defect and alternatives in this case are proved not by testing, but from skilled observation, common sense, knowledge and experience." *Id.*

these variables at a precise moment in time can simply be “observed.” . . . [I]t is apparent that Lytle’s experts have concluded that the seatbelt was defective based only on their hypotheses as to what might have occurred during the accident. [W]e must conclude that Horton’s purported expert testimony failed to comply with Indiana Evidence Rule 702(b), inasmuch as Lytle failed to show that his opinions were based upon reliable scientific principles.²⁰⁷

The court came to the same basic conclusions with regard to Lytle’s second inadvertent release opinion witness, Dr. Anil Khadilkar:

As with Horton, the record shows that Dr. Khadilkar’s testimony regarding inadvertent unlatch was based primarily on observation and analysis of geometry of the restraint system and its alternatives. . . . As with Horton’s testimony, Lytle fails to show that Dr. Khadilkar satisfied the reliability test with regard to his testimony. That is, Dr. Khadilkar never documented the amount of depression that was necessary to release the seatbelt buckle in the accident. Additionally, even though Dr. Khadilkar authored an affidavit and two expert reports, he never identified a reliable basis for his conclusion. It is also noteworthy that Dr. Khadilkar did not perform any research, and he did not identify any literature in support of his theory. . . . The record before us shows that Dr. Khadilkar engaged in less than ten minutes of “testing” to reach his opinion: he placed a buckle against a table in his office and “eyeballed” the depression necessary to release the latchplate. . . . The record is devoid of any indication that Dr. Khadilkar made an effort to measure the force, web tension, direction or rotation that would occur in this type of accident. Moreover, Dr. Khadilkar did not favor the trial court with any other evidence establishing that the seatbelt assemblies moved toward one another, moved with any particular force or load, twisted into position, or that any other object contacted the passenger’s button at all, let alone with sufficient force, direction, duration, rotation, and load conditions to release the buckle. As with Horton’s testimony, we are compelled to conclude that the trial court properly excluded Dr. Khadilkar’s testimony.²⁰⁸

Lytle next argued that scientific testimony is not necessarily required to

207. *Id.* at 311-12. The court noted that there were certain aspects of Horton’s testimony that were susceptible to mere observation, including “(1) the fact that two seat belt buckles are in close proximity to each other; (2) the relative length and position of the buckle stalks; and (3) the fact that some release buttons are more difficult to depress than others.” *Id.* at 312. The court nevertheless excluded the testimony, concluding that such “circumstances indicate that a layperson is just as capable of evaluating the evidence and reaching the conclusions that Horton did on these points. Hence, we reject the notion that Horton could rely upon general principles of physics alone to establish the necessary conclusions to defeat summary judgment.” *Id.* at 312-13.

208. *Id.* at 314.

prove causation. Thus, Lytle argued that the court should not have granted summary judgment because Horton and Dr. Khadilkar's testimony established, at the very least, that other alternatives existed and that it was not a good engineering practice for Ford to have placed a vehicle into commerce with its belt buckles immediately adjacent to one another, allowing for contact and inadvertent release.²⁰⁹ The court rejected Lytle's argument, holding that "the trial court accurately applied the established principles when analyzing the proposed expert testimony regarding a nexus between the data and the accident."²¹⁰ "In short," the court wrote, "the trial court properly required Lytle to demonstrate the reliability of his proposed expert testimony," which he failed to do.²¹¹

Following a discussion about exclusion of exhibits, the Lytle court's final issue concerned whether the trial court properly weighed the designated evidence in granting summary judgment to Ford. Lytle argued, alternatively, "that the trial court erred in relying upon Ford's crash testing[,] . . . that it erroneously concluded that [Ford's] testing disproved [his] experts' theory of defect, and that the evidence did not support the trial court's conclusion that [his] theory could not be replicated."²¹²

The court rejected Lytle's arguments, recognizing that Ford introduced evidence establishing that the seatbelt assembly was not defective or unreasonably dangerous, thus shifting the burden to Lytle. Indeed, "Ford introduced both laboratory and dynamic crash test evidence that accidents exhibiting the crash characteristics alleged by Lytle do not cause contact between the center seatbelt assembly and the passenger latch plate with the forces, direction, duration, rotations, and load conditions necessary to cause unlatching."²¹³ The court continued:

The crash tests that Ford performed demonstrated that the Lytle impact could not have provided sufficient force, and could not have twisted the middle seatbelt buckle sufficiently, with the correct direction, rotation, and force to trigger an accidental release. Ford also introduced evidence that its experts have tested belts under roll conditions and believed that if the belt had inadvertently unlatched, it likely would have become entangled with [the passenger's] arm when she was ejected resulting in marks on the webbing and bruising on her right arm, neither of which occurred.²¹⁴

The court also pointed out that Ford's dynamic and rollover tests were performed

209. *Id.* at 315.

210. *Id.*

211. *Id.*

212. *Id.* at 317. Lytle argued that Ford presented two crash tests with a stationary Ford Ranger that did not roll and that contained dummies sitting upright that were not certified for side impact or rollover testing. *Id.* Accordingly, Lytle maintained that the tests Ford conducted in no way disproved his theory of the case. *Id.*

213. *Id.* at 317-18.

214. *Id.* at 318.

“in substantially similar circumstances to simulate the moment of impact and the roll sequence.”²¹⁵ In addition, Ford “introduced physical evidence that [the seat belt at issue] was in a stowed position at the time of the alleged inadvertent unlatching.”²¹⁶ Accordingly, the court had no problem concluding that Ford presented sufficient evidence to establish grounds for summary judgment and that Lytle failed to present admissible evidence on his required elements of proof to counter Ford’s evidence once the burden had shifted to him.²¹⁷

It is worthy of note that Ford appears to have taken great care to produce evidence necessary to affirmatively carry its summary judgment burden with respect to the claimant’s design defect allegations. The *Lytle* opinion provides excellent guidance for product liability practitioners in terms of Rule 702 admissibility and summary judgment practice. *Lytle* is before the Indiana Supreme Court pending a transfer decision.

City of Gary v. Smith & Wesson Corp.,²¹⁸ a case decided at the outset of the survey period, is noteworthy here because it involved alleged design defects in the unusual context of a public nuisance claim. The City of Gary and its mayor sued several handgun manufacturers, distributors, and retailers, alleging, among other claims, negligent design, manufacture, distribution, and sale of guns with inadequate, incomplete, or nonexistent warnings regarding the risks of harm. The City alleged a separate design defect claim against the manufacturers for failure to include adequate safety devices. The Indiana Court of Appeals rejected all such bases of liability, holding that no duty of care existed between the parties because the attenuated relationship between the City and the defendants rendered the connection between the harm alleged by the City and the conduct of the defendants tenuous and remote.²¹⁹ The court concluded that the City simply was not a reasonably foreseeable plaintiff injured in a reasonably foreseeable manner.²²⁰

The Indiana Supreme Court reversed, first concluding that the City’s allegations were sufficient to give rise to public nuisance and general negligence claims.²²¹ The *City of Gary* court also reversed with respect to the City’s negligent design claim against the manufacturers.²²² The City contended that the manufacturers

were negligent in designing the handguns in a manner such that the defendants foresaw or should have foreseen that the products would pose unreasonable risks of harm to the citizens of Gary who were unaware of

215. *Id.*

216. *Id.*

217. *Id.* at 319.

218. 801 N.E.2d 1222 (Ind. 2003).

219. *City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002), *rev’d*, 801 N.E.2d. 1222 (Ind. 2003).

220. 776 N.E.2d at 388.

221. 801 N.E.2d at 1229-47.

222. *Id.* at 1248-49.

the dangers of a firearm or untrained in the use of handguns, or who are minors or mentally impaired persons.²²³

The City further alleged that the handguns were defective because they lacked:

adequate safety devices including, but not limited to, devices that prevent handguns from being fired by unauthorized users, devices increasing the amount of pressure necessary to activate the trigger, devices alerting the users that a round was in the chamber, devices that prevent the firearm from firing when the magazine is removed, and devices to inhibit unlawful use by prohibited or unauthorized users.²²⁴

Although the *City of Gary* court recognized that the City is not a purchaser and has no direct claim under “statutory or common law theories,” the court nonetheless concluded as follows:

[T]o the extent these actions constitute an unreasonable interference with a public right, the City has alleged a claim for a public nuisance. Whether these alleged design defects are unreasonable and the extent to which they contribute to the harm alleged are matters for trial. Similarly, the availability of relief appropriate to any unreasonable interference, given that the defendant’s products are lawful and the public has a right to acquire them may present substantial obstacles to the City’s claim.²²⁵

The court, therefore, held that at the pleadings stage, “the City has stated a claim for relief.”²²⁶

E. “. . . regardless of the substantive legal theory. . . .”

Indiana Code section 34-20-1-1 provides that the IPLA “governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for a physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought.*”²²⁷ Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA’s statutory definitions are not governed by the IPLA.²²⁸ At the same time, however, Indiana Code section 34-20-1-2 provides that the “[IPLA] shall not be construed to limit

223. *Id.* at 1247.

224. *Id.* The City also alleged that the manufacturers “knowingly and intentionally colluded with each other to adhere to unsafe industry customs regarding the design of handguns.” *Id.*

225. *Id.* at 1248.

226. *Id.*

227. IND. CODE § 34-20-1-1 (2004) (emphasis added).

228. *E.g.*, *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (finding that a claim alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability and, thus, plaintiff could proceed on a warranty theory so long as it was limited to a contract theory).

any other action from being brought against a seller of a product.” That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-2 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover.

In recent years, both federal and Indiana appellate courts have addressed the issue. During the 2004 survey period, the Indiana Supreme Court examined the issue in the case of *Kennedy v. Guess, Inc.*²²⁹ In that case, recall that one of the plaintiffs was struck in the nose by an allegedly defective umbrella that plaintiffs received as a free gift along with the purchase of a “Guess” watch. Recall also that Guess licensed rights to Callanen to market products bearing the “Guess” logo, including the watch and the umbrella at issue.²³⁰ The Kennedys asserted both “strict liability” and “negligence” theories of recovery.

The *Kennedy* court first addressed what it called the “strict liability” claim in the context of Indiana Code sections 34-20-2-3 and -2-4, ultimately determining under the latter statute that Callanen was not entitled to summary judgment because a fact question existed regarding whether it was the principal distributor or seller of the umbrella, thus allowing it to be considered a statutory “manufacturer.”²³¹ Guess, however, was entitled to summary judgment because it could not be considered the principal distributor or seller of the umbrella and, therefore, not a statutory “manufacturer.”²³²

The second issue the *Kennedy* court considered was whether Guess or Callanen owed plaintiffs a duty under section 400 of the Restatement (Second) of Torts²³³ as “apparent manufacturers” of the umbrella. Like Indiana Code section 34-20-2-4, section 400 allows sellers to be treated as manufacturers for purposes of imposing tort liability. The circumstances under which such treatment is sanctioned are vastly different, however, because section 400 subjects sellers to the same liability as manufacturers merely because the seller “puts out as his own product a chattel manufactured by another.”²³⁴ Long before the current IPLA was enacted, the Indiana Court of Appeals employed section 400 in *Dudley Sports Co. v. Schmitt*,²³⁵ to hold a vendor liable for the negligence of a manufacturer where the vendor placed its name on a product and gave no indication of who was the actual manufacturer.

The *Kennedy* court concluded that Callanen could not be deemed an “apparent manufacturer” because it did not design, manufacture, assemble, or test the umbrella, and because “there is nothing to suggest that the Kennedys were

229. 806 N.E.2d 776 (Ind. 2004).

230. *Id.* at 779.

231. *Id.* at 783.

232. *Id.*

233. RESTATEMENT (SECOND) OF TORTS § 400 (1965).

234. *Kennedy*, 806 N.E.2d at 784.

235. 279 N.E.2d 266 (Ind. Ct. App. 1972).

induced to believe that Callanen was the manufacturer of the umbrella in question.”²³⁶ That Guess permitted Callanen to use the Guess name was, by itself, insufficient to hold Callanen liable as an “apparent manufacturer.”²³⁷

The result with regard to Guess was different. Although Guess did not play any role as seller, manufacturer, or distributor, it did exercise “some control over the product itself (like approving placement of the logo).”²³⁸ In announcing its rule of liability with regard to trademark licensors under section 400, the court concluded as follows:

Indiana common law should treat trademark licensors as having responsibility for defective products placed in the stream of commerce bearing their marks, but only so much of the liability for those defects as their relative role in the large scheme of design, advertising, manufacturing, and distribution warrants. Consumers rightly expect that products bearing logos like “Guess” have been subject to some oversight by those who put their name on the product, but those same consumers can well imagine that in modern commerce the products they buy may have actually been manufactured by someone else. . . . Summary judgment for Guess on the negligence claim was inappropriate.”²³⁹

A panel of the Indiana Court of Appeals sanctioned a similar occurrence in *Coffman v. PSI Energy, Inc.*,²⁴⁰ when it allowed a negligence claim to proceed under section 392 of the Restatement (Second) of Torts²⁴¹ for physical injuries allegedly caused by a defective and unreasonably dangerous mechanical trailer cover system against an entity that was undisputedly neither a “manufacturer” or “seller” under the IPLA. In that case, discussed below more fully in connection with the “incurred risk” defense, a truck driver suffered electrical burns when the metal mechanical trailer cover frame contacted an overhead power line as he raised the frame over a trash-filled trailer.²⁴² Among the entities the driver and his wife sued were Rumpke of Indiana, LLC, the company that leased the truck’s services for purposes of the particular job on which the accident occurred; Refuse Handling Services, Inc., the owner of the trash distribution facility at which the

236. 806 N.E.2d at 784.

237. *Id.* “Guess” was the only name appearing on the umbrella. *Id.* As the court concluded: Any involvement Callanen had with the umbrella occurred after it was designed and manufactured. While Callanen did purchase the umbrellas for distribution, it received the umbrellas already packaged for distribution from Interasia. . . . Generally, Callanen did not even open the packaging unless it was going to send less than ten umbrellas to a particular store. . . . [The Kennedys] have failed to carry their burden. The trial court was correct to grant Callanen summary judgment on the negligence claim.

Id. at 785.

238. *Id.* at 786.

239. *Id.*

240. 815 N.E.2d 522 (Ind. Ct. App. 2004).

241. RESTATEMENT (SECOND) OF TORTS § 392 (1965).

242. *Id.* at 525.

accident occurred; and Mountain Tarp, Inc., the designer, manufacturer, and installer of the trailer cover.²⁴³

The *Coffman* court pointed out that Rumpke's attorneys addressed the Coffmans' allegation concerning Rumpke's failure to warn claim as if it were intended to state a claim against Rumpke under the IPLA.²⁴⁴ "However," according to the court,

the Coffmans seek relief from Rumpke only under common law negligence theories [T]he Coffmans argued that there are material issues of fact as to whether Rumpke, acting as a supplier of "chattel dangerous for intended use" under Section 392 of the Restatement (Second) of Torts, and acting as Carl's contract employer, failed to exercise reasonable care.²⁴⁵

Although the court ultimately concluded that Rumpke could bear no liability because Coffman incurred the risk of his injuries as a matter of law, the court clearly appears to have allowed the matter to proceed outside the IPLA.²⁴⁶ The court did so even though the "physical harm" alleged clearly involved physical injuries caused by the allegedly defective and unreasonably dangerous trailer cover. In addition, the court sanctioned the common law negligence claim despite the fact that the allegation against Rumpke involved a failure to warn theory and that Rumpke was undisputedly neither a manufacturer or a seller within the purview of the IPLA.²⁴⁷

Like *Kennedy* and *Coffman*, two recent federal cases, *Ritchie v. Glidden Co.*,²⁴⁸ and *Goines v. Federal Express Corp.*,²⁴⁹ also subjected "sellers" to potential liability based on common law negligence theories for the very same "physical harm" covered by the IPLA. In doing so, those courts assumed that common law "negligence" claims based upon design and warning theories exist separate and apart from the IPLA, citing to cases that were decided before the 1995 amendments to the IPLA and at a time when Indiana still recognized dual-track strict liability and negligence claims.

All four of the foregoing cases allowed common law negligence claims to proceed outside the IPLA. Such is true despite the fact that the cases clearly involved "physical harm" as the IPLA defines the term and defendants that were not "manufacturers" or "sellers" under the IPLA. As noted above, there are important policy considerations involved when courts decide to impose common law negligence liability in cases involving "physical harm" as defined by the IPLA against entities who do not otherwise qualify as "manufacturers" or

243. *Id.* at 524-25.

244. *Id.* at 524 n.1.

245. *Id.*

246. *Id.*

247. *Id.*

248. 242 F.3d 713 (7th Cir. 2001).

249. No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, (S.D. Ill. Jan. 8, 2002) (applying Indiana law).

“sellers” under the IPLA.

The Indiana General Assembly has, through the IPLA, made the policy determination that “sellers” and “manufacturers” may not be held liable for “physical harm” unless the statutory predicates set forth in the Indiana Code have been established.²⁵⁰ The General Assembly has, also through the IPLA, made the important policy determination that the IPLA governs *all* actions against a manufacturer or seller for *physical harm* caused by a product “*regardless of the substantive legal theory or theories upon which the action is brought.*”²⁵¹ It is difficult, therefore, to contemplate that the General Assembly intended a result by which a manufacturer or seller that is not liable under the IPLA for the “physical harm” allegedly caused by a defective product is nevertheless liable under the common law for that same “physical harm” when the IPLA is intended to cover *all* actions against manufacturers and sellers for “physical harm.”²⁵²

In the wake of *Kennedy*, *Coffman*, *Ritchie*, and *Goines*, judges, practitioners, and perhaps even the Indiana General Assembly must take a hard look at whether and to what extent common law negligence claims for the same “physical harm” covered by the IPLA are “other action[s]” that the IPLA does not limit.²⁵³

II. DEFENSES

A. Use With Knowledge of Danger (Incurred Risk)

Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.”²⁵⁴ Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.”²⁵⁵ At least one Indiana court has held in the summary

250. “Sellers,” for example, may be liable under the IPLA only if the entity at issue meets the statutory definitions set forth in Indiana Code section 34-6-2-77(a) or Indiana Code section 34-20-2-4.

251. IND. CODE § 34-20-1-1 (2004) (emphasis added).

252. *Id.* § 34-20-1-1 (emphasis added).

253. Indiana Code section 34-20-1-2 provides that the IPLA “shall not be construed to limit any other action from being brought against a seller of a product.” *Id.* § 34-20-1-2. Both the placement of that provision and the words chosen are important. Having specifically stated in Indiana Code section 34-20-1-1 that the IPLA governs *all* actions against a seller or a manufacturer for physical harm caused by a product regardless of the substantive theory or theories upon which the action is brought, it would seem to logically follow that the only “other action” to which the General Assembly later refers are those alleging some type of non-physical (i.e., commercial) harm. Such harm may be redressed as a matter of contract or warranty in a separate action not intended to be affected by the IPLA’s coverage of “physical harm.”

254. *Id.* § 34-20-6-3.

255. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999).

judgment context that application of the incurred risk defense requires evidence without conflict from which the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.²⁵⁶

The court of appeals decided an incurred risk case during the Survey period. In *Coffman v. PSI Energy, Inc.*,²⁵⁷ plaintiff Carl Coffman was a truck driver for Buchta Trucking. Coffman had driven various types of trucks since 1981, and had experience driving haulers with tarp-covered dump trailers.²⁵⁸ During the summer of 1999, Rumpke of Indiana began subleasing Buchta trucks and drivers, including Coffman.²⁵⁹ On November 16, 1999, Coffman went to a facility operated by Mountain Tarp, Inc. to pick up a forty-eight foot trailer Rumpke had purchased.²⁶⁰ The trailer had a mechanical tarpaulin trailer cover system that Mountain Tarp designed, manufactured, and installed.²⁶¹ A warning near the crank mechanism and adjacent to the tarp brake handle that was used to operate the tarpaulin stated in large red letters on a white background, "DANGER Watch for Electrical Lines Overhead."²⁶² Although the tarp system on the trailer at issue was designed to lift overhead and, therefore, unlike the side-to-side rolling tarps that Coffman had predominately used in the past, a representative from Mountain Tarp taught Coffman how to operate the mechanical tarp device.²⁶³ Coffman indicated that he understood the instructions.²⁶⁴

Coffman was dispatched to pick up a load of trash at a distribution facility near Greencastle operated by Refuse Handling Services, Inc.²⁶⁵ Because he had

256. Indiana courts have decided some important incurred risk cases in the last few years. *E.g.*, *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case since plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999) (finding because the plaintiffs did not adequately specify the basis of their claim, it was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers' injuries resulted leaving the court unable to determine the applicability of the incurred risk defense); *Cole*, 714 N.E.2d 194 (concluding that because plaintiff's job necessarily entailed moving containers across gap between aircraft and aircraft loading equipment and his apparent belief that he had to somehow find a way to work around the known danger posed by the gap, whether plaintiff voluntarily incurred the risk of falling through the gap is also a fact question for the jury's resolution).

257. 815 N.E.2d 522 (Ind. Ct. App. 2004).

258. *Id.* at 524.

259. *Id.*

260. *Id.*

261. *Id.* at 525.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

driven to and from that facility at least twenty-five times, Coffman was aware of the existence at the facility of overhead electrical power lines owned by PSI Energy, Inc. As Coffman raised the tarp over the trash-filled trailer, the metal tarp frame contacted the power lines, causing electricity to pass into the tractor trailer and resulting in serious burns to Coffman.²⁶⁶

Coffman and his wife sued PSI, Rumpke, Refuse Handling, Mountain Tarp, and Vectren Corp. The trial court entered summary judgment and, subsequently, final judgment for each of the defendants.²⁶⁷ The Coffmans appealed. The Indiana Court of Appeals first pointed out that all of their negligence claims "sound in products liability and the failure to warn,"²⁶⁸ though, as noted above, common law negligence (not the IPLA) appears to have been the basis the "failure to warn" claims against Rumpke.²⁶⁹ Next, the court recognized that "the doctrine of incurred risk will preclude recovery 'if the evidence is without conflict and the sole inference to be drawn is that the plaintiff (a) had actual knowledge of the specific risk, and (b) understood and appreciated the risk.'"²⁷⁰

Applying the foregoing standard to the facts of the case before it, the court pointed out that Coffman's deposition testimony revealed that he had driven to the Refuse Handling facility approximately twenty-five times before the accident, that Coffman knew that the overhead power lines were there, that he knew about the risk of contacting those overhead power lines when performing the tarping process, and that he wanted to avoid touching the lines during the process.²⁷¹ Although he knew that the lines were present, Coffman admitted that he simply "didn't think about them" and acknowledged that had he "simply looked up after parking the trailer, in all likelihood he would have noticed that he was directly beneath the power lines that were overhead."²⁷² In addition, the court recognized that there was no dispute that Coffman "could not have avoided seeing the warning label every time he looked at the handle that operated the tarp system."²⁷³

In light of such evidence, the court wrote as follows:

266. *Id.*

267. *Id.* at 526. The theory against Refuse Handling was that Coffman was its business invitee at the time of the accident. *Id.* The theory against PSI (and Vectren) was that it negligently suspended the power line parallel to the facility's graveled driving area and that it breached its duty to insulate, mark, or otherwise warn of the uninsulated power line. *Id.* at 525-26. The Coffmans dismissed Vectren well before the case was adjudicated. *Id.* at 525 n.3. The theory against Rumpke was that it failed to adequately warn Coffman of the danger of operating the tarp in proximity to power lines. *Id.* The theories against Mountain Tarp were that it improperly installed the tarp system and that it, like Rumpke, failed to warn of the danger of operating the tarp in proximity to power lines. *Id.*

268. *Id.* at 526.

269. *See Coffman*, 815 N.E.2d at 524 n.1 and text accompanying *supra* notes 242-48.

270. 815 N.E.2d at 527-28.

271. *Id.* at 528.

272. *Id.*

273. *Id.* at 529.

It is apparent to us that [Coffman] . . . was simply not paying attention, not looking and not thinking, despite his own knowledge concerning the overhead power lines. To be sure, the evidence established that [Coffman] understood the risk and had actual knowledge of the presence and location of the power lines. . . . [T]here was no unreasonable risk of harm that [the defendants] should have expected would not be discovered or realized by [Coffman] in these circumstances. Although [Coffman] had actual knowledge of the presence and location of the power lines on the day that the injury occurred, he unfortunately ignored the lines. . . .

While we are certainly sympathetic to the Coffmans' plight, it is apparent that the injuries [Coffman] sustained were brought about by his own negligence. . . . [A]s a matter of law, the alleged inadequacy of the warnings provided to [Coffman] could not have been a proximate cause of his injuries. . . . [H]e was fully aware of the risks of injury associated with his conduct, and he disregarded all warnings that were provided. Simply put, no warning could have prevented this accident because [Coffman] essentially paid no attention to what he was doing or where he was doing it. . . .

In our view, the evidence overwhelmingly demonstrates that [Coffman] incurred the risk of his injuries, such that his contributory negligence was more than the total of any alleged negligence on the part of the appellees.²⁷⁴

The *Coffman* court, therefore, held that the trial court properly entered summary judgment.²⁷⁵

Although the case was decided during last year's survey period, *Vaughn v. Daniels Co.*,²⁷⁶ bears mention here because it is an important incurred risk case and because it is pending a decision by the Indiana Supreme Court on whether to grant transfer. There, defendant Daniels Company designed a coal preparation plant. A contractor constructed the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications.²⁷⁷ Plaintiff Vaughn, an employee of the contractor, was injured while installing one of the coal sumps into the coal preparation plant.²⁷⁸ In an effort to aid his co-workers during installation, Vaughn climbed onto the sump without his safety belt while a pipe was maneuvered through the wall of the plant by a forklift and raised to the level of the sump.²⁷⁹ After raising the pipe, workers wrapped a chain around the pipe

274. *Id.*

275. 815 N.E.2d at 529.

276. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003).

277. *Id.* at 1116.

278. *Id.*

279. *Id.*

to support it as the forklift pulled away.²⁸⁰ The chain gave way, the pipe slipped, and Vaughn fell.²⁸¹

One of Daniels' arguments was that Vaughn knew and appreciated the risk of falling and failed to take proper precautions despite his knowledge.²⁸² It was undisputed that Vaughn understood and appreciated the risks of working at heights and the need for him to wear a safety belt.²⁸³ He was, in fact, wearing his belt until moments before the accident; but he did not put it back on before rushing to the sump to assist his co-worker.²⁸⁴ The trial court agreed, finding that Vaughn "knew and appreciated the risk of falling that came with not being properly [fastened] while working at heights and despite his knowledge and appreciation of this risk, failed to take proper safety precautions."²⁸⁵

Daniels countered that his failure to wear his safety belt was not voluntary under the circumstances because he was rushing to help his coworkers who needed assistance. Thus, Vaughn argued that "although he knew of the general risks of working at heights without wearing a safety belt, his failure to do so in this case was reasonable because of the need to help his coworkers."²⁸⁶ In addition, Vaughn pointed to his deposition testimony in which he stated that he had no place to fasten his safety belt while working on the sump at issue and that there had been a handrail around another sump he had previously installed onto which he could fasten the belt.²⁸⁷

Focusing on the phrase "actual knowledge of the specific risk" and taking its cue from *Ferguson v. Modern Farm Systems, Inc.*,²⁸⁸ the court reasoned as follows:

It is true that the undisputed designated evidence is that Vaughn understood the danger of working at heights over six feet without a safety belt and yet climbed to the top of the sump to install the pipe without wearing it or tying off. . . . That being said, however, there remains a question concerning the voluntariness of the failure to wear the belt given the urgent need of the coworkers for help. There is also the risk of working on the sump without a handrail as a result of the allegedly defective design. There remain questions as to whether Vaughn was fully aware that the sump had no handrail before he went up the ladder and that he fully understood the risk of being on the sump without a handrail such that he really could have voluntarily undertaken

280. *Id.*

281. *Id.*

282. *Id.* at 1132.

283. *Id.*

284. *Id.*

285. *Id.* at 1131.

286. *Id.* at 1132.

287. *Id.*

288. 555 N.E.2d 1379 (Ind. Ct. App. 1990).

the task of installing the pipe even in spite of the danger.²⁸⁹

Accordingly, the *Vaughn* court held that questions of fact exist “relating to whether Vaughn incurred the risk, and, therefore, summary judgment was inappropriate.”²⁹⁰

It is important to note here that, in discussing the incurred risk defense, the *Vaughn* court wrote that Indiana Code section 34-20-6-3 “provides a *complete defense* where a plaintiff incurs the risks associated with the use of a product.”²⁹¹ The use of the term “complete” is not insignificant. A “complete” defense in this context is one that, if the requirements to establish it are met, relieves a defendant of liability and automatically eliminates any need for fault allocation. Incurred risk, misuse, and alteration/modification were “complete” defenses to IPLA claims before the 1995 amendments.²⁹²

In addition to *Vaughn*, the court of appeals opinion in *Hopper v. Carey* determined that incurred risk remains a complete defense in Indiana.²⁹³ The opinion in *Coffman* is an interesting counter to *Vaughn* and *Hopper*. As noted above, the *Coffman* court seemed to believe that the incurred risk defense was not a complete one, and proceeded with a comparative fault analysis, ultimately finding no liability because, as a matter of law, no reasonable juror could have concluded anything other than that Coffman’s comparative fault in incurring the risk exceeded the total fault that could be assessed to the alleged tortfeasors.²⁹⁴

When the General Assembly amended in 1995 what is now Indiana Code section 34-20-6-3(3), it eliminated the word “unreasonably” from the phrase that previously read “nevertheless proceeded ‘unreasonably’ to make use of the product.” The language choice tends to support the proposition that incurred risk is not subject to fault apportionment. Perhaps more importantly, the definition of “fault” for cases governed by the Comparative Fault Act includes a plaintiff’s assumed or incurred risk, whereas the definition of “fault” for purposes of the

289. 777 N.E.2d at 1132.

290. *Id.*

291. *Id.* at 1130 (emphasis added).

292. *E.g.*, *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984) (misuse); *Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994) (modification/alteration); *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715 (Ind. Ct. App. 1995) (incurred risk).

293. 716 N.E.2d 566, 576 (Ind. Ct. App. 1999) (“[E]ven if a product is sold in a defective condition unreasonably dangerous, recovery *will be denied* an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily [incurred] the risk.”) (emphasis added) (citation omitted).

294. The court in *Coffman* noted that incurred risk bars a product strict liability claim when the evidence is undisputed and reasonable minds could draw only one inference. 815 N.E.2d at 528 (citing *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 402 (Ind. Ct. App. 1999)). “While the allocation of each party’s proportionate fault is generally a question for the trier of fact, in a negligence action, such is not the case when there is no dispute in the evidence and the trier of fact could reach only one conclusion.” *Id.* at 528.

IPLA does not.²⁹⁵ It follows, therefore, that an IPLA plaintiff's incurred risk, because it is not "fault" under the IPLA, should not be subject to fault apportionment.²⁹⁶

B. Misuse

Indiana Code section 34-20-6-4 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.²⁹⁷

Knowledge of a product's defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of "misuse" many times may be similar to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers under Indiana Code 34-20-4-1(1) or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable under Indiana Code section 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*,²⁹⁸ and *Burt v.*

295. Indiana Code section 34-6-2-45(b) defines "fault" for cases governed by the Comparative Fault Act and includes within that definition the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." IND. CODE § 34-6-2-45(b) (2004). Indiana Code section 34-6-2-45(a) defines "fault" for cases governed by the IPLA, and, although it tracks the definition in Section (b) closely, conspicuously eliminates any reference to assumption of risk and incurred risk. *Id.* § 34-6-2-45(a). "Fault" for purposes of the IPLA means:

... an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:

- (1) Unreasonable failure to avoid an injury or to mitigate damages.
- (2) A finding under IC 34-20-2 ... that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

Id.

296. On this point, Indiana Pattern Jury Instruction 7.05(b) further confuses the issue because it requires fault allocation even in the fact of a finding that a claimant incurred the risk. Practitioners and judges on occasion cite to *Kerr*, 719 N.E.2d at 402, to support a conclusion that incurred risk should be part of a comparative fault analysis. However, *Kerr* largely undercuts such a conclusion because the Indiana Court of Appeals in *Kerr* relied on *Heck v. Robey*, 659 N.E.2d 498, 505 nn.9&10 (Ind. 1995), a premises liability case that relied upon what is now Indiana Code section 34-51-2-6 for its conclusion. As noted above, there is a difference between the definition of fault under the Comparative Fault Act and the definition of fault under the IPLA, which does not include incurred risk.

297. IND. CODE § 34-20-6-4.

298. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the

Makita USA, Inc.,²⁹⁹ have resolved the applicability of the misuse defense as a matter of law, while others such as *Vaughn v. Daniels Co.*³⁰⁰ have reserved the applicability of the defense for the jury's consideration.³⁰¹

As is the case with the incurred risk defense, courts applying Indiana law continue to reach contrary decisions with regard to whether misuse is a complete

manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car. Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026. For example, the decedent failed to block the tires while he used the jack; he used the jack when the vehicle was not on a flat surface; and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030. The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could have found that [the decedent] was less than 50% at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question.

299. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. The district court held that there was "no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances." *Id.* at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code section 34-20-6-4 had been established. *Id.*

300. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003).

301. *Vaughn*, discussed at length earlier, is noteworthy here because transfer may be granted by the Indiana Supreme Court. The Indiana Court of Appeals determined that a genuine issue of material fact precluded summary judgment on the applicability of the misuse defense. The trial court found that Vaughn misused the coal sump to the extent that it was not foreseeable for Daniels to expect that Vaughn would "fail to [properly secure himself] when working at heights and for a bolt to 'foul' in the steel of the pipe [Vaughn] was attempting to maneuver in place." *Id.* (citation omitted). Daniels pointed to record evidence showing that Vaughn was not using the sump for its intended use to process slurry at the time he was injured and that the sump was not capable of being operated for its intended purpose during installation when Vaughn was injured. *Id.* at 1129-30. Vaughn countered by arguing that "the mere fact the blueprints show that a ladder allowed access into the sump means that he was using the sump in a foreseeable manner." *Id.* Vaughn also pointed to his own deposition to the effect that other sites utilizing sumps had steel overhead from which hangers could be used to hold the pipe during installation. Vaughn's expert added that "[t]he design of the facility to house the heavy media sump did not include a beam to suspend a chain hoist to afford safe assembly and maintenance disassembly of heavy and long pipe components." *Id.* (citation omitted).

defense. In *Burt*,³⁰² an Indiana federal district court recognized that the misuse of a product operates as a complete defense. Two other Indiana Court of Appeals decisions, *Indianapolis Athletic Club v. Alco Standard Corp.*³⁰³ and *Morgen v. Ford Motor Co.*,³⁰⁴ have held that a misuse is a “complete” defense under the IPLA, recognizing that the facts giving rise to a misuse defense effectively create an unforeseeable intervening cause, thus eliminating any need to compare fault.³⁰⁵ On the other hand, decisions in cases such as *Chapman v. Maytag*³⁰⁶ and *Barnard v. Saturn Corp.*³⁰⁷ have determined that the degree of a user’s or a consumer’s misuse is a factor to be assessed in determining that user’s or consumer’s “fault,” which must then be compared with the “fault” of the alleged tortfeasor(s). The Indiana Supreme Court in *Morgen v. Ford Motor Co.*,³⁰⁸ acknowledged the conflicting authority but did not address the issue.

The debate is interesting. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant.³⁰⁹ In addition, the IPLA now requires the trier of fact to compare the “fault” (as the term is defined by statute) of the person suffering the physical harm, as well as the “fault” of all others whom caused or contributed to cause the harm.³¹⁰ The IPLA mandates that “[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.”³¹¹

302. *Burt*, 212 F. Supp. 2d at 893.

303. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

304. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002).

305. *Id.*

306. 297 F.3d 682 (7th Cir. 2003).

307. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, “the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action.” *Id.* at 1029. The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* “By specifically directing that the jury compare all “fault” in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme.” *Id.* at 1030. Notwithstanding that conclusion, the *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that “no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for the injuries that he sustained.” *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question.

308. 797 N.E.2d 1146, 1148 n.3 (Ind. 2003).

309. IND. CODE § 34-20-7-1 (2004).

310. *Id.* § 34-20-8-1(a).

311. *Id.* § 34-20-8-1(b).

The statutory definition of “misuse” seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser’s conduct. That would tend to explicitly demonstrate that “misuse” is not “fault.” The district judge in *Chapman* recognized as much. As he also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement and a plaintiff’s misuse arguably falls within Indiana Code section 34-6-2-45(a)’s definition of “fault.”

That the General Assembly may not have overtly indicated that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem equally likely that the legislature’s silence on the matter indicates an implicit recognition that the “complete” nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties.³¹²

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product’s delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.³¹³

Although this survey article does not address in detail any modification or alteration cases, practitioners should recognize that the alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, Indiana Code section 34-20-2-1 provides that

a person who sells, leases, or otherwise puts in to the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property is subject to liability for physical harm caused by that product to the user or consumer or to the user’s or consumer’s property if . . . (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.³¹⁴

312. Before the 1995 amendments to the IPLA, misuse was a “complete” defense. *E.g.*, *Estrada v. Schmutz Manufacturing Co.*, 734 F.2d 1218 (7th Cir. 1984).

313. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994).

314. IND. CODE § 34-20-2-1.

Accordingly, if a claimant cannot establish or if a defendant conclusively proves that the product underwent some "substantial alteration" between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief as a threshold matter.³¹⁵

CONCLUSION

The 2004 survey period, like others in recent years, illustrates that the IPLA has not provided complete guidance with regard to some important policy decisions. Courts applying Indiana law are doing their part to make those decisions. This is no doubt a thought-provoking time for product liability practitioners in Indiana.

315. Indiana Pattern Jury Instruction 7.05(C) does not correctly reflect Indiana law in this regard. There is undeniable overlap within the statutory framework in this context. Because the alteration defense is incorporated directly into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1, there should be little controversy that the alteration/modification defense is "complete" in nature by the very statute that imposes product liability in Indiana as a threshold matter. If a claimant cannot establish, or if a defendant conclusively proves, that the product underwent some "substantial alteration" between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief.

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

YOU SAY YOU WANT AN EVOLUTION?: AN OVERVIEW OF THE ETHICS 2000 AMENDMENTS TO THE INDIANA RULES OF PROFESSIONAL CONDUCT

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INTRODUCTION¹

The Indiana Supreme Court rarely makes sweeping changes to the rules governing professional conduct by lawyers. Indiana's original Code of Professional Responsibility became effective in 1971 and was based on the ABA Model Code of Professional Responsibility. Sixteen years later the Code was revised again. Modeled on the ABA Model Rules of Professional Conduct, the Indiana Rules of Professional Conduct went into effect on January 1, 1987. Again drawing on an ABA-created template, the Indiana Supreme Court, based in large part on the sweeping work of the Indiana Ethics 2000 Task Force, amended the Rules of Professional Conduct, effective January 1, 2005. The amended rules are available on-line² and in the 2005 *Indiana Rules of Court*.³ The amended rules are also available showing changes to the rules, but not the comments, in redlined format.⁴ The new rules present lawyers with a third set of significant changes within a period of approximately thirty-five years.

The new rules affect virtually every Indiana lawyer in every law practice setting, and so it is prudent for all lawyers to have a keen understanding of these changes. Where it might be useful to the reader in understanding the significance of the Indiana rules, this article will discuss differences between the Indiana Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. Where pertinent, it will also track the evolution of changes throughout both the ABA and Indiana Ethics 2000 processes.

I. BACKGROUND

In the spring of 1997, ABA leadership created the Commission on the

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1. The summary of the Indiana Supreme Court's recent changes to Indiana's Rules of Professional Conduct was first published in the Indiana State Bar Association's *Res Gestae* as a four-part series from November 2004 to March 2005. It is republished here with permission of *Res Gestae*.

2. See http://www.in.gov/judiciary/rules/prof_conduct/index.html (last visited Apr. 7, 2005)

3. 2005 INDIANA RULES OF COURT (Thomson West 2005).

4. Order Amending Rules of Professional Conduct (Sept. 2004), available at <http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf>.

Evaluation of the Rules of Professional Conduct, dubbed the "Ethics 2000 Commission" in recognition of the anticipated completion of its work near the turn of the millennium. Its mission was to conduct a comprehensive evaluation of the ABA Model Rules in light of developments since their original adoption in 1983.⁵ After several years of study and taking testimony at hearings held throughout the United States, the Commission made a final report to the ABA House of Delegates in August 2001.⁶ After partial consideration of and action on the Commission's report that summer, the House approved changes to the ABA Model Rules in February 2002, and, with a few exceptions, adopted the Commission's proposals.⁷

Partially paralleling the Ethics 2000 process and responding to recent corporate finance scandals, the ABA president in the spring of 2002 appointed a Taskforce on Corporate Responsibility. Part of the charge to the Taskforce was to examine the ethical principles governing lawyers for corporate and other organizational clients.⁸ On March 31, 2002, the taskforce issued its final report, which included recommendations to the House of Delegates to amend ABA Model Rules of Professional Conduct 1.6, dealing with client confidentiality, and 1.13, dealing with organizational clients.⁹ Similar amendments to Rule 1.6 had originally been proposed to the ABA House of Delegates by the Ethics 2000 Commission, but rejected by the House.¹⁰ At its August 2003 meeting, the ABA House of Delegates approved the Corporate Responsibility Taskforce's amendments to Rules 1.6 and 1.13.¹¹

On August 16, 2002, shortly after the ABA House of Delegates' final action on the Ethics 2000 Commission report, Indiana Chief Justice Randall T. Shepard wrote to then-ISBA president, Kristin Fruehwald, urging the state bar to study the results of the Ethics 2000 process and make its recommendations to the Indiana Supreme Court.¹² President Fruehwald appointed Carol Adanamis, chair of the state bar Legal Ethics Committee, to chair an Ethics 2000 Taskforce charged with reviewing the Indiana Rules of Professional Conduct in light of the amendments to the ABA Model Rules. The Indiana Taskforce's five committees were each

5. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441-42 (2002). Materials related to the work of the Ethics 2000 Commission are available on the website of the ABA Center for Professional Responsibility at: <http://www.abanet.org/cpr/ethics2k.html>.

6. Love, *supra* note 5, at 443.

7. *Id.*

8. Report of the American Bar Association Task Force on Corporate Responsibility 2 (Mar. 31, 2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf [hereinafter ABA Task Force Report].

9. *Id.* at 77.

10. Love, *supra* note 5, at 443.

11. American Bar Ass'n House of Delegates Daily Journal, 2003 Annual Meeting 12 (Aug. 11-12, 2003), available at <http://www.abanet.org/leadership/2003/2003journal.pdf>.

12. Letter from Chief Justice Randall T. Shepard to Kristin G. Fruehwald, President, Indiana State Bar Association (Aug. 16, 2002) (copy on file with the author).

assigned to examine different parts of the ABA Model Rules.¹³ The further changes to the ABA Model Rules prompted by the ABA Taskforce on Corporate Responsibility were also incorporated into the Indiana project. Following publication of the Indiana Taskforce's draft recommendations, the state bar hosted five roundtable discussions throughout the state. After taking account of written and oral comments, the Indiana Taskforce submitted its report and recommendations to the ISBA House of Delegates. On October 23, 2003, the House of Delegates adopted the taskforce recommendations with a few exceptions that will be noted later in this Article. The ISBA formally transmitted its proposal to Chief Justice Shepard on December 2, 2003. On February 25, 2004, the supreme court published the state bar's proposed amendments on its website and invited comments. Seven months later, on September 30, 2004, the supreme court issued an order amending the Indiana Rules of Professional Conduct, effective January 1, 2005.

II. THE PREAMBLE AND SCOPE

A. Civility Concerns

The supreme court made a number of changes to the introductory portions of the Indiana Rules of Professional Conduct, the Preamble and Scope, that are worthy of discussion. In these sections, the court departed from the ABA Model Rules in ways suggesting that it is quite serious about incorporating notions of professionalism and civility into the Indiana Rules. The first indicator is found in new language in paragraph [1] of the Indiana Preamble, which does not appear in either the ABA Model Rules or the old Indiana or ABA rules: "Whether or not engaging in the practice of law, lawyers should conduct themselves honorably." Another iteration of this theme is found in paragraph [8] of the Indiana Preamble, where our supreme court replaced the word "zealous" that appeared in the previous version of the Preamble, and that still appears in the Preamble to the ABA Model Rules, with the word "effective."¹⁴ This theme appears again in the supreme court's redaction of the word "zealously" from Preamble paragraph [9].¹⁵ Thematically related to these Indiana variations, in Comment [1] to Indiana

13. The coverage of the five committees and their chairs were:

- Preamble, Scope, Rules 1.0-1.5, 1.15-1.17, 2 and 9; chair, Robert Clemens of Indianapolis
- Rules 5 and 6; chair, John Conlon of Indianapolis
- Rules 1.6, 1.18 and 4; chair, Douglas Cressler, formerly of Indianapolis, now of Denver, Colorado
- Rules 3, 7 and 8; chair, Patricia McKinnon, of Indianapolis
- Rules 1.7-1.14; chair, Ted Waggoner, of Rochester, Indiana.

14. The applicable sentence, showing the change from the current and previous ABA versions and previous Indiana version, reads: "Thus, when an opposing party is well represented, a lawyer can be an effective ~~zealous~~ advocate on behalf of a client and at the same time assume that justice is being done."

15. The following language was incorporated intact into the Indiana Preamble from the ABA

Rule 1.3, the supreme court redacted language that appears in the corresponding ABA comment that refers to "zeal in advocacy."¹⁶

B. Retention of Intermediary Rule

The ABA Model Rules eliminated old Model Rule 2.2, dealing with the lawyer as an intermediary, in favor of addressing that role as a type of multiple client representation covered by Model Rule 1.7. But the Indiana Supreme Court retained old Rule 2.2, which was identical to now-defunct ABA Model Rule 2.2. Indiana's different approach is foreshadowed by the retention of language in Preamble paragraph [2], now missing from the ABA rules, that refers to the lawyer's role as an intermediary between or among clients.¹⁷ The possible significance of Indiana's retention of Rule 2.2 will be covered, *infra*, in the discussion of that rule.

C. Lawyers As Neutrals

Paragraph [3] of the Indiana and ABA Preambles is new language recognizing that lawyers often function as third-party neutrals in alternative dispute resolution proceedings. It points out that certain rules have a direct bearing on third party neutrals, including amended Rule 1.12, which now applies the same conflict of interest standard to former third-party neutrals as it does to former judges, and new Rule 2.4, which establishes certain ethical standards for lawyers who function as third-party neutrals. This paragraph also explicitly states that which has always been understood: that some of the rules, preeminently Rule 8.4, govern the conduct of lawyers even when they are not representing clients.

D. Public Service Responsibilities

Language added to paragraph [6] of the Indiana and ABA Preambles urges lawyers to "further the public's understanding of and confidence in the rule of

Preamble, save the word "zealously," which is shown here as stricken-through: "These principles include the lawyer's obligation ~~zealously~~ to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." IND. PROF. COND. R. pmbl.

16. The Indiana version of Comment [1] to Rule 1.3 differs from the corresponding ABA comment in the following respect, with the Indiana redactions stricken-through: "A lawyer must also act with commitment and dedication to the interests of the client ~~and with zeal in advocacy upon the client's behalf~~." Continuing in the same comment, both the Indiana and ABA versions emphasize that the lawyer has discretion to place limits on how far he or she is willing to go as an advocate: "A lawyer is not bound, however, to press for every advantage that might be realized for a client." IND. PROF. COND. R. 1.3 cmt. 1.

17. The retained language states: "As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client." IND. PROF. COND. R. pmbl.

law and the justice system,” and expands somewhat upon the rationale for and reach of pro bono responsibilities by stating that lawyers “should” ensure equal access to justice for those who are hampered by economic or social barriers.¹⁸

E. Application of the Rules in Other Settings

Paragraph [20] of the Scope portion of the Preamble has been reworked somewhat (generally consistent with the ABA model) to emphasize two points. First, new language points out that violation of a rule does not necessarily mean that another non-disciplinary remedy is appropriate.¹⁹ Also, in acquiescence to the growing body of authority that looks to the Rules of Professional Conduct as articulating duties and responsibilities relevant to the question of whether a lawyer has violated the applicable standard of care for civil liability purposes, the supreme court deleted language intended to preclude such use, and instead added the following language: “[These rules] are not designed to be a basis for civil liability, but these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client.”^[20] . . . Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”²¹

Old Preamble paragraphs [19] and [20] were removed in both the Indiana and ABA versions. Old paragraph [19] was largely a restatement of the truism that the rules pertaining to client confidentiality and the law governing attorney-client and work product privileges are separate, albeit interactive, matters. Thus, commentary about the attorney-client privilege was not seen as germane to the Rules of Professional Conduct. Old paragraph [20] stated: “The lawyer’s

18. In a related development, the supreme court also amended the Oath of Attorneys on September 30, 2004, to add the following new language, effective January 1, 2005: “I will never reject, from any consideration personal to myself, the cause of . . . those who cannot afford adequate legal assistance.” IND. ADMIS. DISC. R. 22 (2005).

19. Indeed, we have recently seen this point illustrated in Indiana, where the Indiana Court of Appeals in *Gerald v. Turnock Plumbing, Heating and Cooling, LLC*, 768 N.E.2d 498 (Ind. Ct. App. 2002) stated that a law firm can avoid disqualification by erecting timely institutional protections to screen off a laterally hired lawyer from involvement with a matter concerning which the lateral hire has a disqualifying conflict of interest. This was at the time, of course, not an accurate statement of the applicable Rule of Professional Conduct Rule 1.10(b). This perceived disconnect between the law of lawyer discipline and the law of disqualification has now been resolved by the Indiana Supreme Court’s adoption of a rule allowing timely screening under these circumstances. See IND. PROF. COND. R. 1.10(c) and cmt. 6 thereto.

20. This sentence in Indiana Preamble paragraph [20] differs in emphasis, if not in substance, from the parallel ABA Preamble paragraph [20], which reads: “[These rules] are not designed to be a basis for civil liability, but reference to these Rules as evidence of the applicable standard of care is not prohibited.” The Indiana Supreme Court appears to have affirmatively approved the use of the Rules of Professional Conduct as one source of evidence of the standard of care in legal malpractice cases. The source of this different language was the ISBA proposal.

21. IND. PROF. COND. R. pmb1.

exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." The significance of the elimination of this language is lost on this author. The reference to Rule 1.6 clearly signifies that lawyers should not be second-guessed about when to exercise discretion to reveal client confidences when permitted under the exceptions found in Rule 1.6(b). While this is true to the extent that the rule itself makes that decision discretionary, it is also possible that other law, particularly in a corporate regulatory environment, might impose a duty to disclose when the rules give discretion.

F. Definitions Relocated

A final change to the Preamble was the relocation of the definitions of key terms from the Preamble to a new Rule 1.0. In a sense, the creation of a rule that does nothing but define terms is illogical. On balance, however, the elevation of these important definitions to rule status will remove them from their historical hiding place in the Preamble and put them in a location where they are more prominent.

III. TERMINOLOGY—RULE 1.0

In all respects but one, the definitions of key terms used throughout the new Indiana rules are identical to the definitions in the ABA rules. Except for their relocation from the Preamble to Rule 1.0, some definitions remain the same as the old rules, and there is no need to comment further. The definitions of certain now-defunct terms were eliminated. Other definitions were amended, and additional definitions were included to define terminology new to the rules.

A. Client Consent and Related Documentation

The nomenclature of the old rules, when referring mostly to client consent to a lawyer's actions, was to require "consent after consultation." Therefore, the old definition of "consult" or "consultation" has been eliminated. It was abandoned in favor of the new concept of "informed consent," defined in Rule 1.0(e). The notion of informed consent finds its way into the rules at many points, often in the context of conflict of interest waivers.²² Because it is a new definition, it has new comments as well which are found in Comments [6] and [7].

22. A non-exhaustive list of rules where the notion of informed consent appears includes: Rules 1.2(c) (limitations on the scope of representation), 1.6(a) (revelation of otherwise confidential client information), 1.7(b)(4) (waivers of concurrent conflicts of interest), 1.8(a) (financial transactions between lawyer and client), 1.8(b) (use of information to client's disadvantage), 1.8(f) (accepting compensation from a third party), Rule 1.8(g) (aggregate settlements), 1.9 (former client conflicts of interest), and 1.18(d) (representation adverse to a former prospective client).

Informed consent is defined to denote, “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”²³ While this definitional shift might not signify much substantive change, the point of emphasis has evolved from mere process (“consultation”) to result (“informed”). The comments highlight this point:

The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.²⁴

There are several other new definitions related to the concept of informed consent. The rules make varying demands upon lawyers relative to the type of documentation required to manifest an act of consent. The least demanding level of documentation is none at all—oral consent is sufficient. With some notable exceptions, the minimum level of documentation required by the rules is “confirmation in writing,” a newly defined concept.

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.²⁵

This definition is clearly met by a writing generated or signed by the person giving consent, but it is also satisfied by the unilateral act of the lawyer delivering a confirming writing to the person who gave consent. What constitutes a writing is defined as follows: “‘Writing’ or ‘written’ denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording or e-mail.”²⁶ Thus, the definition of a writing is very broad and takes into account evolving technologies for documenting agreements.

In a few instances, the rules require an enhanced degree of documentation—some consents must be documented in the form of a writing

23. IND. PROF. COND. R. 1.0(e).

24. IND. PROF. COND. R. 1.0 cmt. 6.

25. IND. PROF. COND. R. 1.0(b).

26. IND. PROF. COND. R. 1.0(n).

“signed by the client.”²⁷ The earlier-mentioned definition of a writing applies equally in these circumstances, as well, and a definition is also provided for what constitutes a signature. “A ‘signed’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”²⁸ Like the definition of a writing, this definition is quite flexible in its recognition that virtually any reliable means of authenticating that the writing was made or adopted by the consenting person will suffice.²⁹

In many instances, the new rules require documentation of consent that is facially more demanding than under the old regime. But the definitions of what constitutes a writing, and where applicable, what constitutes a signature, are so forgiving and flexible that these changes should not be viewed as casting an unworkable burden on the bar, especially when prudent law practice management argues in favor of requirements at least as strict.

B. Law Firms And Partners

The definition of a “firm” or a “law firm” has been modified to take into account the evolution of various forms of law practice in contemporary use and expansively incorporates all forms of law practice entities, including law partnerships, professional corporations, sole proprietorships, corporate law departments, legal aid organizations, and any other associations authorized to practice law.³⁰ In a related change, the definition of “partner” now includes “a member of an association authorized to practice law.”³¹ This broader definition becomes relevant when considering the special duties and responsibilities of supervisory lawyers under Rules 5.1, dealing with supervision of other lawyers, and 5.3, dealing with supervision of non-lawyers.

27. *Id.* Rule 1.5(c) (contingent fee agreements); Rule 1.8(a) (business transactions with clients); and Rule 1.8(g) (aggregate settlements).

28. IND. PROF. COND. R. 1.10(n).

29. For a more detailed explanation of these concepts and a criticism of the ABA Model Rules of Professional Conduct for not being sufficiently rigorous in imposing documentation requirements, see Donald R. Lundberg, *Documenting Client Decisions: A Critique of the Model Rules Post-Ethics 2000*, PROFESSIONAL LAW., Summer 2003, at 2.

30. IND. PROF. COND. R. 1.0(c). The supreme court rejected an ISBA recommendation that would have somewhat softened the definition of a law firm by stating that the term “may include” any of the entities among those listed. The final definition lists those entities as being law firms without qualification. Nonetheless, comment [4] to Rule 1.0 asserts that in some cases the structure of a legal aid organization may result in it being treated as a single law firm or separate firms depending on organizational structure. Moreover, comment [3] points out that even though a corporate or governmental legal department is undoubtedly a law firm, there is sometimes a question of fact concerning the identity of the client, particularly as it pertains to corporate subsidiaries or affiliates.

31. IND. PROF. COND. R. 1.0(g).

C. Fraud

The definition of “fraud” or “fraudulent” has been amended (consistent with the ABA definition) to incorporate that which is fraudulent under other applicable substantive or procedural law and “has a purpose to deceive.”³² Previously, the definition included any conduct that had a “purpose to deceive” but was not merely negligent or passive conduct.³³

D. Conflict of Interest Screening

In several instances under the rules, conflicts of interest imputed to law firms that arise because of the migration of lawyers (or in some instances, non-lawyer staff) from old law firms, including government employment, to new law firms may be avoided if the personally conflicted lawyer or non-lawyer staff member is “screened” from the matter at the new firm. Even though the concept of screening pre-dates the most recent amendments to the rules, for the first time we now have a definition of screening. “‘Screened’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”³⁴

E. Tribunal Defined

The only instance in which the Indiana Supreme Court took a definitional approach different from the ABA is with the definition of “tribunal.” The ABA defines the term broadly to include, in addition to a court, any arbitration body, administrative agency or legislative body that renders binding legal judgments after hearing evidence and argument from parties.³⁵ By contrast, Indiana’s definition, taken from the ISBA proposal, states, “‘Tribunal’ denotes a court, an arbitrator, or any other neutral body or neutral individual making a decision,

32. IND. PROF. COND. R. 1.0(d).

33. The supreme court rejected an ISBA recommendation that the definition of fraud mean, “fraud or constructive fraud as defined under Indiana law.” One difference between the ISBA proposal and the court’s version is that the court’s approach anticipates that some fraudulent conduct by lawyers may occur in other jurisdictions where the local law of fraud may differ from Indiana’s. The court’s inclusion of the qualifying clause, “and has a purpose to deceive,” raises the question whether constructive fraud will be treated as fraudulent conduct for purposes of the rules. The answer is not clear. *Compare* Sanders v. Townsend, 582 N.E.2d 355, 358 (Ind. 1991) (“Intent to deceive is not an element of constructive fraud; instead, the law infers fraud from the relationship of the parties and the circumstances which surround them.”), *with* Rice v. Struck, 670 N.E.2d 1280, 1284 (Ind. 1996) (“The elements of constructive fraud are: . . . (ii) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists . . .”). *See also* Matter of Scahill, 767 N.E.2d 976, 979 (Ind. 2002).

34. IND. PROF. COND. R. 1.0(k).

35. MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2000).

based on evidence presented and the law applicable to that evidence, which decision is binding on the parties.”³⁶ The difference appears to be more stylistic than substantive.

IV. CONFLICTS OF INTEREST

A. Rule 1.7 Conflict of Interest: Current Clients

Rule 1.7 governs concurrent conflicts of interest, including conflicts between multiple clients who are represented by the same lawyer, conflicts between current clients and third parties, and conflicts between current clients and the lawyer’s personal interests. The Indiana Supreme Court followed ABA Model Rule 1.7 with minor exceptions. Rule 1.7 has been restructured for clarity so that paragraph (a) states the general rule presumptively prohibiting all concurrent conflicts of interest, and paragraph (b) sets forth the circumstances under which representation is permitted notwithstanding a presumptive conflict of interest. To the extent there was any question in the past about whether a lawyer could obtain client consent to represent one client directly adverse to another client in the same matter in litigation, Rule 1.7(b)(3) now states that client consent may be sought only if “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”³⁷ This language seems to definitively preclude, for example, simultaneous representation of husband and wife in a dissolution of marriage proceeding.³⁸ The other change of significance in the black-letter rule is that all conflict waivers must be confirmed in writing.³⁹ Thus, even though prudence dictates that the affected client or clients should sign a written consent, the lawyer’s written confirmation is sufficient. This represents an enhanced obligation to document conflict of interest waivers that, previously, were not required to be in writing.

The more noteworthy changes in Rule 1.7 appear in the commentary. Those changes are not substantive, but they do give lawyers a great deal more guidance in working through conflict of interest questions. Indeed, the comments will be quite helpful to the practitioner in that they address the resolution of many conflict of interest problems that frequently arise in specific law practice settings.

Here are some of the highlights. New Comment [3] emphasizes the importance of creating institutional mechanisms for identifying and avoiding conflicts of interest by asserting that ignorance of conflicts will not excuse a violation of the rule. There is a helpful new Comment [5] addressing conflicts of interest that arise due to party realignment or changes in a client’s organizational structure through, for example, acquisition or merger. Comment [11] addresses conflicts of interest arising when one lawyer handles a matter

36. IND. PROF. COND. R. 1.0(m).

37. IND. PROF. COND. R. 1.7(b)(3).

38. IND. PROF. COND. R. 1.7 cmt. 17.

39. IND. PROF. COND. R. 1.7(b)(4).

adverse to another lawyer who is a spouse or stands in some other close family relationship. This is in substance the standard of old Rule 1.8(i), which was eliminated in favor of this comment. There are new comments addressing when consent to a conflict of interest may no longer be operative upon a material change in circumstances⁴⁰ and the limited circumstances under which client consent to a future conflict will be effective.⁴¹ There is a new comment dealing with conflict questions arising in representation of class members in class action litigation, with particular reference to unnamed class members.⁴² The comment on positional conflicts of interest, old Comment [9], has been redrafted and now appears as Comment [24]. Expansive new commentary gives greater guidance in the analysis of potential conflicts arising from representing multiple clients in the same matter.⁴³ Old Comment [8], dealing with conflicts involving organizational affiliates, such as corporate subsidiaries, has been completely redrafted and repositioned as Comment [34].

B. Rule 1.8 Specific Rules Governing Current Client Conflicts

Rule 1.8 chronicles a variety of specific situations out of which conflicts of interest arise. There are several noteworthy changes.

1. *Rule 1.8(a) Transactions Between Lawyer and Client.*—Rule 1.8(a) governs transactions between lawyers and clients when their interests are adverse. In this circumstance, new language in Rule 1.8(a)(2) requires that the client be affirmatively advised in writing of the desirability of seeking the advice of independent legal counsel in the transaction. Whereas previously only the client's consent to such a transaction had to be in a writing, new language in Rule 1.8(a)(3) outlines the essential content of the writing and requires that it be signed by the client. Comment [1] to Indiana Rule 1.8 includes cautionary language that does not appear in the corresponding ABA Model Rule: "Paragraph (a) applies when a lawyer seeks to renegotiate the terms of the fee arrangement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement."⁴⁴ Comments [1] through [4] represent a significant expansion in the helpful commentary on business transactions with clients. While it is generally understood that an initial fee contract between lawyer and client does not implicate Rule 1.8(a), new language in Comment [1] cautions that the rule's "requirements must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee."⁴⁵

2.. *Rule 1.8(c) Gifts From Clients.*—Rule 1.8(c), governing gifts from clients, has been expanded to also prohibit the solicitation of any substantial gift

40. IND. PROF. COND. R. 1.7 cmt. 21.

41. IND. PROF. COND. R. 1.7 cmt. 22.

42. IND. PROF. COND. R. 1.7 cmt. 25.

43. IND. PROF. COND. R. 1.7 cmts. 29-33.

44. IND. PROF. COND. R. 1.8 cmt. 1.

45. *Id.*

from a client. New language in Comment [6], former Comment [2], notes that there is no ethical prohibition against accepting an unsolicited gift, even a substantial one, from a client, but that other legal doctrines may make such a gift vulnerable to future attack. New Comment [8] indicates that there is no per se prohibition against drafting a will or other legal document that designates the lawyer as a personal representative or other fiduciary, but notes that circumstances may exist that make such a transaction one that could be considered a potential conflict of interest under Rule 1.7.

3.. *Rule 1.8(g) Aggregate Settlements.*—The danger of aggregate settlements, governed by Rule 1.8(g), is that they potentially place the lawyer in the middle of a conflict between clients over how much each should benefit from a fixed pot of money or how much each should contribute to a total settlement offer. As between the co-clients, every dollar of benefit to one client represents a corresponding loss to the other; hence, the need for informed consent. As before, the lawyer must disclose to all co-clients all terms of the settlement and the respective participation of each client in the settlement. But now, new language in Rule 1.8(g) requires the lawyer to document informed consent by a writing signed by the clients. It remains unclear whether the required disclosures must be in writing, but the prudent lawyer will want to make sure that they are. Comment [14] on aggregate settlements has been added where none existed in the past.

4.. *Rule 1.8(h) Limiting Liability and Settling Malpractice Claims.*—Organizationally, Rule 1.8(h) has been restructured for clarity into two subparts, the first deals with prospective limitations on malpractice liability, and the second deals with settling actual or potential liability claims by unrepresented current or former clients. Also, Rule 1.8(h)(2), dealing with settlement of claims, now clearly states that written notice of advisability that the client or former client be represented by counsel must be provided far enough before any settlement to allow a reasonable opportunity to seek advice of counsel. New Comments [14] and [15] have been added to expand upon the black-letter rule. Comment [14] provides that this rule does not preclude the use of an arbitration clause in an attorney-client contract provided it is legally enforceable and “the client is fully informed of the scope and effect of the agreement.”⁴⁶

5. *Rule 1.8(j) Lawyer-Client Sexual Relationships.*—New Rule 1.8(j) generally codifies in rule form a prohibition against sexual relationships with clients that has already been established by Indiana case law.⁴⁷ It states: “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”⁴⁸ New related commentary, Comments [17] through [19], includes a test for identifying which constituents of an organizational client are off limits for sexual relationships: anyone “who supervises, directs or regularly consults

46. IND. PROF. COND. R. 1.8(h) cmt. 14.

47. See, e.g., *In re Lesley*, 820 N.E.2d 142 (Ind. 2005); *In re Grimm*, 674 N.E.2d 551 (Ind. 1996).

48. IND. PROF. COND. R. 1.8(j).

with that lawyer concerning the organization's legal matters."⁴⁹

6. *Rule 1.8(k) Imputation of Prohibitions.*—While the imputation of conflicts of interest are generally governed by Rule 1.10, Rule 1.8 prohibitions are governed by a separate, and new, provision. All Rule 1.8 prohibitions are imputed to other members of the directly implicated lawyer's firm, with the exception of the prohibition on sexual relationships with clients found in Rule 1.8(j), which is personal in nature and not imputed.⁵⁰

Previously, imputation of Rule 1.8 prohibitions was governed by Rule 1.10. Old Rule 1.10 applied the imputation doctrine only to the prohibitions of subparts (c) (gifts from clients) and (k) (part-time prosecutors) of Rule 1.8. Thus, new Rule 1.8(k) represents a significant expansion in the application of imputation principles to Rule 1.8 prohibitions.

C. Rule 1.9 Duties to Former Clients

Rule 1.9, governing conflicts of interest with former clients and protection of information related to the representation of former clients, remains substantially the same. However, waivers of conflicts involving former clients must now be confirmed in writing.⁵¹

The content of old Rule 1.10(b) has now been incorporated into Rule 1.9 as Rule 1.9(b), and old Rule 1.9(b) has been re-numbered Rule 1.9(c).⁵² Thus, it is now in Rule 1.9(b) that we find the general prohibition against a lawyer who changes firms from representing a new-firm client adverse to an old-firm client about whom the lawyer acquired information protected by Rule 1.6.

As with Rule 1.7, the commentary to Rule 1.9 has been expanded to provide better guidance and to address its application to commonly occurring situations.

D. Rule 1.10 Imputation of Conflicts of Interest: General Rule

For the most part, the principles governing the imputation of conflicts of interest from the directly affected lawyer to other lawyers in the same firm are found in Rule 1.10. The general imputation rule is stated in Rule 1.10(a), but the supreme court, following the ABA, has now grafted on an exception to imputation when "the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."⁵³ An example of the application of this exception is set forth in new Comment [3]: "Where one lawyer in a firm could not effectively represent a given client because of strong

49. IND. PROF. COND. R. 1.8(j) cmt. 19.

50. IND. PROF. COND. R. 1.8(k) & cmt. 20.

51. IND. PROF. COND. R. 1.9(a).

52. The shift of Rule 1.10(b) to Rule 1.9 occurred within the ABA Model Rules in 1989. Indiana did not make a corresponding amendment at that time. Thus, this change in Indiana does not reflect the Ethics 2000 deliberations so much as it attends to unfinished business from 1989.

53. IND. PROF. COND. R. 1.10(a).

political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.”⁵⁴

Clearly, the most significant amendment to Rule 1.10 is found in new Rule 1.10(c). This provision addresses the potential conflict of interest problems that arise when lawyers change law firms. Historically, when a lawyer left a firm, having been exposed to disqualifying information about a client while at the old firm, and joined a new firm, the migrating lawyer’s disqualification from representing a new-firm client against an old-firm client in the same or a substantially related matter was imputed to the entire new firm. Screening⁵⁵ (sometimes called a “Chinese wall”) was not a permissible method of defeating imputation of the migrating lawyer’s disqualification to the new law firm.⁵⁶ This has now changed in Indiana.⁵⁷ New Rule 1.10(c) permits timely screening to defeat imputation of a conflict imported via a migrating lawyer under three conditions. First, the personally disqualified lawyer must not have had primary responsibility for the matter at the old firm.⁵⁸ Second, the personally disqualified lawyer must be timely screened from any participation, including no apportionment of any part of the fee from the matter.⁵⁹ And third, there must be

54. IND. PROF. COND. R. 1.10 cmt. 3.

55. Screening is defined in IND. PROF. COND. R. 1.0(k).

56. The unavailability of screening to defeat imputation was clearly the case for purposes of lawyer discipline. Much less clear was whether timely screening could be used to defeat a disqualification motion in a matter in litigation. Most prominently, the Indiana Court of Appeals in *Gerald v. Turnock Plumbing, Heating and Cooling, LLC*, 768 N.E.2d 498 (Ind. Ct. App. 2002) opined that timely screening would defeat disqualification. That opinion was unfortunately ambiguous about whether it was addressing only disqualification proceedings or interpreting the Rules of Professional Conduct. To the extent *Gerald* could be read as interpreting the old Rules of Professional Conduct to permit the use of screening as a disciplinary standard, it was wrong. One could convincingly argue that a disconnect between the disqualification standard and the discipline standard is an undesirable situation. A salutary effect of new Rule 1.10(c) is to bring those two standards into synch.

57. The ABA Ethics 2000 Commission recommended the adoption of a screening provision in Model Rule 1.10. The ABA House of Delegates rejected that recommendation. In Indiana, the state bar association Ethics 2000 Taskforce followed the final ABA version and did not recommend the inclusion of a screening provision in Rule 1.10. The ISBA House of Delegates accepted the recommendation without change. Thus, the incorporation of a screening provision in Rule 1.10 to defeat imputation represents an independent decision of the Indiana Supreme Court, prompted by neither the ABA Model Rules nor the ISBA recommendations.

58. The requirement in Indiana Rule 1.10(c)(1) that screening is only permitted in cases where the personally disqualified lawyer did not have primary responsibility for the disqualifying matter was not an element of the screening provision that the ABA Ethics 2000 Commission recommended.

59. New Comment [6] to Indiana Rule 1.10 provides that the prohibition on sharing fees with the screened lawyer “does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation

prompt written notice to the affected former client. The purpose of notice is to allow the former client to monitor the integrity of the screen. Most of the old commentary to Rule 1.10 regarding the definition of a law firm has now been incorporated into new Rule 1.0(c) and related comments.

To screen or not to screen has been a matter of considerable controversy nationally. By allow screening in the context of migrating private practice lawyers, Indiana is now aligned with a minority of eight jurisdictions⁶⁰ and the position of the Restatement of the Law Governing Lawyers.⁶¹

E. Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Conflict of interest standards for lawyers migrating into and out of government employment have always been, and continue to be, different, and somewhat less rigorous, than the standard for lawyers who change firms in a private law practice environment. A policy motivation behind this differentiation is to blunt some of the disincentives to rendering service in government employment. To this extent, Rule 1.11 has not been materially changed. However, consistent with conflict of interest waivers throughout the new rules, conflict waivers in this setting must now be confirmed in writing.⁶²

Rule 1.11(a) has been amended to clarify a previously ambiguous point: former client conflicts of interest for lawyers who migrate to and from government employment are solely governed by Rule 1.11(b), not Rule 1.9(a). The applicable standard of disqualification—that the migrating lawyer must have participated personally and substantially in the putatively disqualifying matter while in government service—remains the same. However, the amended rule also clarifies that under these circumstances, the former government lawyer is obliged to protect the confidences of his former government client consistent with the standard of Rule 1.9(c). Deletion of the word “private” from old Rule 1.11(a)(2) also conveys an intent to apply this same standard to lawyers moving from one government employer to another.

New Rule 1.11(b), formerly incorporated into Rule 1.11(a), continues to allow screening of lawyers who leave government employment. With the advent of screening in Rule 1.10, the availability of screening for former government lawyers should now be viewed, not as an exception to the general rule, but merely as one application of screening in a different law practice setting.

Amended Rule 1.11(d) (formerly Rule 1.11(e)) clarifies that current government lawyers are governed by Rules 1.7, and 1.9. So for example, a lawyer who goes into government service from private practice will be prohibited from having any involvement in a matter on behalf of his or her government

directly related to the matter in which the lawyer is disqualified.” IND. PROF. COND. R. 1.10.

60. THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, app. B at 154 (2005).

61. RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 124(2) (1998).

62. IND. PROF. COND. R. 1.11(a)(2) & 1.11(d)(2)(i).

employer that is adverse to a former private practice client in a matter that is the same or substantially related to the private practice representation. However, the usual imputation principles of Rule 1.10 do not apply so that the personally disqualified lawyer's conflict will not be imputed to other lawyers representing the government agency, even in the absence of a screen, although screening is advised.⁶³

*F. Rule 1.12 Former Judge, Arbitrator, Mediator or Other
Third-Party Neutral*

Rule 1.12, previously dealing with conflicts of interest involving former judicial officers, has been expanded to apply the same conflict of interest standard to mediators and other third-party neutrals. As with all conflict of interest waivers under the new rules, conflicts falling within this rule are waivable only upon informed consent confirmed in writing.⁶⁴ Application of the waiver provision to third-party neutrals creates an apparent conflict between Rule 1.12 and Rule 7.6(B) of the Indiana Rules for Alternative Dispute Resolution, which provides: "[A] neutral shall decline to act in any capacity except as a neutral unless the subsequent association is clearly distinct from the issues involved in the alternative dispute resolution process."⁶⁵ Waivers are not contemplated by the ADR rule.

Rule 1.12(b) has been the standard for governing the negotiation for employment by law clerks of judicial officers, and it has now been expanded to apply identically to law clerks of mediators and third-party neutrals. In this regard, new Indiana Rule 1.12(b) differs from ABA Model Rule 1.12(b), which excluded clerks for mediators or third party neutrals from the Rule 1.12(b) employment-negotiation standard.

G. Rule 1.18 Duties to Prospective Clients

Rule 1.18 is an entirely new rule designed to address confidentiality and conflict of interest issues that arise from initial consultations with prospective clients that do not ripen into full lawyer-client relationships. The Indiana Supreme Court adopted ABA Model Rule 1.18 with some modifications. Rule 1.18 sets standards for protection of information disclosed by the prospective client, and addresses the conditions under which the consulted lawyer and the lawyer's firm will be disqualified as a consequence of having been exposed to such information.

Rule 1.18(a) defines a "prospective client" as "[a] person⁶⁶ who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect

63. IND. PROF. COND. R. 1.11 cmt.2.

64. IND. PROF. COND. R. 1.12(a).

65. IND. A.D.R. R. 7.6(b).

66. "Person" is not defined. Presumably it applies equally to organizations, acting through constituents, as it does to natural human beings.

to a matter.”⁶⁷ Rule 1.18(b) states the general prohibition that the use or revelation of information learned in the consultation is prohibited unless otherwise allowed by Rule 1.9, dealing with protection of information related to representation of former clients.

Rule 1.18(c) states the general conflict of interest standard. It essentially incorporates the Rule 1.9 former client/substantial relationship standard, but only if the lawyer received information from the prospective client that would be “significantly harmful” to the prospective client in the matter. Also, Rule 1.18(c) includes an imputation standard that disqualifies all lawyers in the same firm as the consulting lawyer who was exposed to significantly harmful information.

Rule 1.18(d) carves out exceptions to the disqualification and imputation tests of Rule 1.18(c). First, as in most conflicts situations, both the would-be current client who will now be adverse to the prospective client and the prospective client may waive by giving informed consent, confirmed in writing.⁶⁸ Second, if the consulting lawyer who was exposed to significantly harmful information “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” other lawyers in the same firm may take on a client adverse to the prospective client so long as the consulting lawyer is timely screened and the prospective client is given written notice that a screen has been employed.⁶⁹

Related comments expand upon the new rule. Of special note are: Comment [2], providing that unilateral, unsolicited imposition of information upon a lawyer will not generally cloak the communicator with the protections of the prospective client rule; and Comment [5], suggesting that a consulting lawyer may solicit an advance agreement from a prospective client that no disclosed information will prohibit the lawyer from representing another client. Surprisingly, Comment [5] to ABA Model Rule 1.18 goes on to suggest that such an agreement may also provide for the use of any information disclosed to the prospective client’s disadvantage. Acting on the recommendation of the state bar association, the Indiana Supreme Court wisely rejected that provision.

Indiana Rule 1.18 includes an additional comment that was recommended by the state bar association and does not appear in the corresponding ABA Model Rule. Indiana Comment [10] provides that other lawyers in the consulting lawyer’s firm will be similarly disqualified to the extent the consulting lawyer shares disqualifying information with them.

Lawyers should be aware that Rule 1.18, while helpful, is not a panacea for avoiding disqualifications caused by exposure to prospective client information. As noted above, the consulting lawyer may take reasonable steps to limit the acquisition of information to that reasonably necessary to determine whether to represent the client. Comment [4] suggests that this would generally pertain to information necessary to screen for conflicts of interest. This will be of limited benefit in most cases, where it is not the prospective client that presents the

67. IND. PROF. COND. R. 1.18(a).

68. IND. PROF. COND. R. 1.18(d)(1).

69. IND. PROF. COND. R. 1.18(d)(2).

conflicting representation, but the *next* prospective client who wants the firm to handle a substantially related matter adverse to the earlier prospective client. When consulting with the first prospective client, the consulting lawyer cannot be reasonably expected to know that, (1) the firm will not be hired, and (2) an adverse party will later try to hire the firm. It is true that Comment [5] suggests that a conflict waiver may be demanded from the prospective client as a condition to the initial interview, but lawyers will often have legitimate business reasons to avoid employing such adversarial tools with potential new clients.

H. Rule 2.2 Intermediary

The ABA eliminated Model Rule 2.2, dealing with the subject matter of lawyers who act in an intermediary capacity between multiple clients wishing to resolve a matter in dispute, in favor of considering such matters as an aspect of multiple client representation governed by Model Rule 1.7. By contrast, the Indiana Supreme Court retained Rule 2.2 and related commentary without change, even though the state bar association had recommended that Indiana follow the ABA and eliminate Rule 2.2. In addition to Rule 2.2, Comment [28] to Indiana Rule 1.7 addresses the role of the lawyer as intermediary. As a practical matter, Rule 2.2 adds nothing of substance to the application of Rule 1.7; but it might provide some additional guidance to lawyers who choose to accept the role of intermediating disputes between multiple clients. Undoubtedly as an artifact of retaining Rule 2.2, Indiana Rule 2.2 still contains the outmoded notion of consent after consultation, rather than the new nomenclature of informed consent, and it does not stipulate that client consent must be confirmed in writing. However, because Rule 2.2 describes a sub-set of Rule 1.7 conflicts of interest, the confirmation in writing requirement in Rule 1.7 should trump Rule 2.2's failure to mention it.

I. Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

Hidden in new Rule 6.5⁷⁰ is a set of standards governing conflict of interest analysis for limited legal services programs provided to the public under the auspices of nonprofit organizations, frequently bar associations, and the courts. The rule generally allows lawyers to cooperate with such programs that provide short-term, limited legal services to clients without being burdened by a full-blown application of conflict of interest principles. The rule blunts some disincentives for lawyers to participate in such programs, which are generally targeted at clients from traditionally underserved populations. These representations are true attorney-client relationships, albeit ones that are limited in time and scope, and not prospective client matters governed by Rule 1.18.

This rule has no application to lawyers who choose to provide short-term, limited legal services to clients in their own law practices. Limitations on the scope of those representations will be governed by Rule 1.2(c) and the ordinary

70. Old Rule 6.5 contained Indiana's voluntary pro bono plan. Those provisions have been transferred unchanged into a new rule, Rule 6.6.

conflict of interest standards of Rules 1.7, 1.9, and 1.10.

Rules 6.5(a)(1) and (2) provide that a lawyer is disqualified from giving brief service under a qualifying program only for conflicts of interest under Rules 1.7 and 1.9(a), or imputed under Rule 1.10, that the lawyer actually knows about. In effect, this means that the lawyer is free to provide the service even though a check of the lawyer's firm conflicts system would reveal a disqualifying conflict about which the lawyer was not actually aware. Also, Rule 6.5(b) provides that the imputation rules of Rule 1.10 are not otherwise applicable, meaning that a brief consultation with a limited legal services client will not be imputed to the consulting lawyer's law firm. Comment [2], though, cautions that the information gleaned by the lawyer during the course of rendering limited legal services is information that must be maintained confidential under the provisions of Rules 1.6 and 1.9(c).

V. OTHER RULES GOVERNING THE LAWYER-CLIENT RELATIONSHIP

A. Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

Section (a) of Rule 1.2 deals with the allocation of authority between client and lawyer. Little of substance has changed, in that the rule still assigns to the client the authority to determine the objectives of representation, and to the lawyer, in consultation with the client, the authority to determine the means used to achieve those objectives. The court amended this section to include an explicit cross-reference to Rule 1.4, thereby emphasizing that consultation about means to be used is an aspect of client communications governed by the standards of Rule 1.4.

The court added a new sentence to Rule 1.2(a): "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."⁷¹ This is not a significant change inasmuch as lawyers previously had, and still have, authority under Rule 1.6(a) to reveal client confidences to the extent impliedly authorized to carry out the representation. Thus, the rule recognizes that in many situations the means to be used by the lawyer are self-evident given the nature of the representation, and no specific consultation is necessary. New Comment [2] discusses the circumstance when the lawyer and client are at odds over the means to be employed. It suggests that, in the final analysis, either the lawyer may be required to withdraw from the representation as contemplated by Rule 1.16(b)(4), or the client may force withdrawal by discharging the lawyer.⁷² Also, new Comment [3] contemplates that the lawyer and client may agree about the choice of means at the outset of representation and need not revisit the matter unless circumstances change in a material way.

Rule 1.2(a) previously allocated to the client the decision to "accept an offer

71. IND. PROF. COND. R. 1.12(a).

72. IND. PROF. COND. R. 1.16(a)(3).

of settlement.”⁷³ The new formulation of the rule allocates to the client the decision to “settle.”⁷⁴ The intent of this change is to clarify that the client has authority over decisions both to accept settlement offers and to make them.

ABA Model Rule 1.2(c) provides that a lawyer may limit the “objectives” of the representation “if the limitation is reasonable under the circumstances and the client gives informed consent.”⁷⁵ The ABA substituted the word “objectives” for the previous term “scope.” The Indiana Supreme Court’s version of Rule 1.2(c) retains the word “scope” but adds “and objectives.”⁷⁶ The meaning of our supreme court’s retention of the word “scope” is unclear, in part because it offered no comment on the point. Rule 1.5(b), dealing with attorney fees, provides that the scope of representation and the basis for or rate of the fee must be communicated to the client, “preferably in writing.” Thus, one might think of “objectives” as defining the end goals of the client in a particular representation, whereas “scope” defines the general subject matter of the representation. For example, a lawyer might accept a domestic relations matter and consider the decision to seek child custody an objective of that representation. Whereas, the fact that the lawyer is handling the domestic relations matter for a client and not the client’s claim for personal injuries arising from a recent automobile accident might be thought of as a limitation on the scope of representation.

Rule 1.2(c) also includes a new qualification on limiting the objectives and scope of representation—that any such limitation must be reasonable under the circumstances and the client must give informed consent. New Comment [7] expands upon such agreements, warning that, “an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation.”⁷⁷

Old Rule 1.2(e), dealing with the duty of the lawyer to counsel the client about any ethical limitations on the representation, has been relocated to the rule dealing with client communications and now appears as Rule 1.4(a)(5).

B. Rule 1.3 Diligence

There were no changes to the black-letter rule requiring lawyers to act with reasonable diligence and promptness in representing clients. New commentary has been added that is consistent with the supreme court’s express interest in discouraging discourteous conduct as a method of client advocacy. Comment [1] now states that the duty of diligence “does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”⁷⁸ And Comment [3] specifically states that a lawyer is not

73. IND. PROF. COND. R. 1.2(a) (1983).

74. IND. PROF. COND. R. 1.1(a) (2005).

75. MODEL RULES OF PROF’L COND. 1.2(c).

76. IND. PROF. COND. R. 1.2(c).

77. IND. PROF. COND. R. 1.2 cmt. 7.

78. IND. PROF. COND. R. 1.3 cmt. 1. *See also* Tim A. Baker, *A Survey of Professionalism and*

precluded from “agreeing to a reasonable request for a postponement that will not prejudice” the client.⁷⁹

Additional new commentary urges that lawyers control their workload so as not to compromise their obligations to existing clients.⁸⁰ Also, new Comment [5] urges sole practitioners to have a plan in place to take care of the needs of their clients in the event of the lawyer’s death or disability.⁸¹

C. Rule 1.4 Communication

Rule 1.4(a), dealing with client communications, has been expanded to include more detail about the components of keeping a client reasonably informed. The subsidiary parts include: promptly advising the client of any matter requiring the client’s informed consent; reasonably consulting with the client about the means to be employed to achieve the clients’ objectives; keeping the client reasonably informed about status; responding promptly to reasonable requests for information; and consulting with the client about ethical or legal limits on what the lawyer can do for the client. The commentary to Rule 1.4 has been expanded significantly to provide lawyers greater guidance in the area of client communications.

D. Rule 1.5 Fees

Previously, the general rule on fees required only that a lawyer’s fee be reasonable. As amended, Rule 1.5(a) now provides that, “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount of expenses.”⁸² The non-exclusive list of factors bearing on reasonableness remains the same as before, but it is now clear that a reasonableness analysis applies to expenses as well as to fees.⁸³

Whereas, Rule 1.5(b) previously required only that the basis or rate of fee be communicated to the client, amended Rule 1.5(b) also requires communication of the scope of the representation and the terms related to charging expenses to the client. As before, with the exception of contingency fees, written fee agreements are preferred, but not required. New language goes on to state explicitly that, “[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client.”⁸⁴

Civility, 38 IND. L. REV. 1305 (2005).

79. IND. PROF. COND. R. 1.3 cmt. 3.

80. IND. PROF. COND. R. 1.3 cmt. 2.

81. The Indianapolis Bar Association has published a helpful booklet entitled, “Planning Ahead: A Plan for Protecting Your Clients in the Event of Your Disability or Death,” available at http://www.indybar.org/files/PlanningAhead2004_FINAL.pdf.

82. IND. PROF. COND. R. 1.5(a).

83. The list of factors bearing upon reasonableness are more fee than expense-focused. For some guidance on the reasonableness of expenses of representation, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-373 (1993).

84. IND. PROF. COND. R. 1.5(b). A provision in Comment [1] to Rule 1.8 that is unique to

In the past, contingency fees have been treated exceptionally in that a written fee agreement was required. Amended Rule 1.5(c) enhances the written documentation requirement for contingency fees by requiring that the written fee agreement be signed by the client. Moreover, the written contingency fee agreement must clearly advise the client of the way expenses for the matter will be handled whether or not the client prevails.

Rule 1.5(d)(1), dealing with the general prohibition against charging contingency fees in domestic relations cases, remains substantially the same. Indiana continues to depart from ABA Model Rule 1.5(d)(1) in that it expressly prohibits charging a fee that is contingent on obtaining child custody. The genesis of this provision was the ISBA's recommendation to the court. The court also retained language from old Rule 1.5(d) that recognizes the propriety of charging a contingency fee in a post-decree support collection action, so long as the client is informed in writing of alternative methods of collecting support, including, presumably, the services of county prosecutor's child support offices. Curiously, this same principle is recognized in Comment [6] to ABA Model Rule 1.5, but similar commentary does not appear in Comment [6] to Indiana Rule 1.5.

Amended Rule 1.5(e), dealing with division of fees between lawyers not in the same firm, tightens up the client consent elements. Whether a fee is to be divided proportionately to lawyer involvement or merely on the basis that the referring lawyer has agreed to assume joint responsibility for the representation, there must be a confirming writing directed to the client that documents the client's agreement to the arrangement, "including the share each lawyer will receive."⁸⁵ Previously, a written agreement was only required in cases where the division of fee was not in proportion to each lawyer's services. Also, the client did not necessarily have to be informed of the specifics of the fee division and did not need to explicitly agree. Rather, the client's consent could be inferred from failure to object. A new clarification in Comment [8] explains that the limits on fee splitting are not meant to apply when lawyers previously associated in the same firm agree to divide fees to be received in the future for work done before they disassociated.

There is added commentary that expands on the new provisions of Rule 1.5.

E. Rule 1.6 Confidentiality of Information

Historically, of all of the ABA Model Rules, Rule 1.6, governing the lawyer's obligation to keep client information confidential and exceptions thereto, probably enjoyed the fewest adherents among the states. In addition to the general review of the Rules of Professional Conduct prompted by the Ethics 2000 process, other factors came into play to prompt the ABA to re-draft much

Indiana states: "Paragraph [1.8](a) [dealing with business transactions between lawyers and clients] applies when a lawyer seeks to renegotiate the terms of the fee arrangement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement." IND. PROF. COND. R. 1.8 cmt. 1.

85. IND. PROF. COND. R. 1.5(e).

of Rule 1.6, including most prominently, the corporate finance scandals of the recent years and the enactment by Congress of the Sarbanes-Oxley Act of 2002.⁸⁶

The Indiana Supreme Court's promulgation of Rule 1.6 in a form identical to ABA Model Rule 1.6 could be a harbinger of a new role for Model Rule 1.6 as a statement of true national consensus. The supreme court's new take on the duty of client confidentiality represents its most radical departure from the recommendations of the ISBA. The ISBA's proposal to the court was that Rule 1.6 in its present form should be retained without modification.⁸⁷

The basic rule of client confidentiality, stated in Rule 1.6(a), remains substantively the same: all information from whatever source related to the representation of the client is confidential unless disclosure is impliedly authorized in order to carry out the representation or unless there is informed client consent. The exceptions in Rule 1.6(b) to the duty to honor client confidentiality are largely new material. The exceptions grant the lawyer discretion to reveal otherwise-confidential client information, but in no event is the lawyer compelled by the rule to reveal information.⁸⁸ Also, the exercise of discretion to reveal a client confidence must be, as in the past, supported by the lawyer's reasonable belief that it is necessary.

Indiana Rule 1.6(b)(1) previously permitted lawyers to reveal client information to prevent the client from committing any criminal act.⁸⁹ Under amended Rule 1.6(b)(1), the lawyer may reveal client information in order "to prevent reasonably certain death or substantial bodily harm."⁹⁰ This exception simultaneously excludes circumstances where revelation was previously permitted, and includes circumstances where revelation was previously prohibited. Whereas, in the past a lawyer was permitted to reveal client information to prevent even minor crimes, now the act to be prevented must be death or serious injury. In the past, non-criminal conduct that was likely to cause death or serious injury could not be revealed; now, it can. Previously, the lawyer could only reveal information to prevent the client from engaging in a criminal act; now the lawyer may reveal in order to prevent death or serious injury caused by the acts of anyone, including non-clients.

Old Indiana Rule 1.6(b)(2), the lawyer self-defense exception, was relocated to Rule 1.6(b)(5), but otherwise remains the same.

Two new, and related, confidentiality exceptions now appear in Rules

86. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

87. The ISBA Ethics 2000 Taksforce's recommendation to the House of Delegates was to accept ABA Model Rule 1.6 in full. That recommendation was defeated by a vote of the House of Delegates, the result of which was to propose retaining Indiana Rule 1.6 as is.

88. Under circumstances where an exception applies and a lawyer has discretion to reveal client confidences, other law (e.g., child abuse reporting statutes) or other Rules of Professional Conduct may apply to transform discretion into an obligation.

89. The old ABA formulation of the Rule 1.6(b)(1) was that revelation of client information must be to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm.

90. IND. PROF. COND. R. 1.6(b)(1).

1.6(b)(2) and (3). Rule 1.6(b)(2) permits a lawyer to reveal client information to prevent the client from committing a crime or fraud reasonably certain to result in substantial injury to another's financial interests or property "in furtherance of which the client has used or is using the lawyer's services."⁹¹ Rule 1.6(b)(3), in addition, permits a lawyer to reveal in order to mitigate or rectify such injury that has already resulted from use of the lawyer's services.⁹² Under the old Indiana regime, a lawyer would have had discretion to reveal confidences under these circumstances only if the client's future conduct was reasonably believed to be criminal in nature, and only to prevent the conduct, regardless of whether the lawyer's services were implicated in the crime. The circumstances under which Indiana lawyers may reveal are now expanded to include fraudulent, but non-criminal conduct, and also for the purpose of mitigating or rectifying completed client-caused harm, rather than merely to prevent it, but only so long as the lawyer's services were used by the client in furtherance of the crime or fraud.⁹³

Another new exception found in Rule 1.6(b)(4) to the duty to maintain confidences permits a lawyer to reveal client information to another lawyer in order to "secure legal advice about the lawyer's compliance with these Rules."⁹⁴ This is a relatively uncontroversial provision that liberates lawyers from the previous charade of seeking advice in purely hypothetical terms. As a policy matter, this exception is sound because it encourages lawyers to seek guidance in the increasingly complex areas of legal ethics and professional responsibility, to the benefit of clients, the bench, and the bar.

A final new exception in the black-letter rule appears in Rule 1.6(b)(6), permitting a lawyer to disclose client information "to comply with other law or a court order."⁹⁵ This is not, in substance, a new exception, inasmuch as the commentary to old Rule 1.6 described the circumstances under which a lawyer might be obligated to comply with a court order or legal obligation to reveal client information.⁹⁶ Revealing confidential client information under these

91. IND. PROF. COND. R. 1.6(b)(2).

92. Both of these provisions had their origin in the original recommendations of the ABA Ethics 2000 Commission, but in August 2002 the ABA House of Delegates rejected them. They were resubmitted to the ABA House by the Taskforce on Corporate Responsibility, and in February 2003, the House adopted them.

93. It is unstated here, but certainly the case, that the lawyer's services must have been unwittingly exploited by the client for fraudulent or criminal purposes. Rule 1.2(d) prohibits a lawyer from counseling or assisting a client in criminal or fraudulent conduct, so the lawyer must refuse. IND. PROF. COND. R. 1.6 cmt. 7; MODEL RULES OF PROF'L COND. 1.6 cmt. 7.

94. IND. PROF. COND. R. 1.6(b)(4).

95. IND. PROF. COND. R. 1.6(b)(6).

96. Comments [20] and [21] to old Rule 1.6 stated:

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

circumstances, especially when it is non-privileged, is probably best not described as discretionary. Once the client has declined to pursue or has exhausted any remedies for testing the limits of evidentiary privilege, the lawyer is legally obligated to reveal the client information. Thus, it is discretionary only in the theoretical sense that the lawyer could decline and risk going to jail for contempt. The old, related commentary has been replaced with a new Comment [13] that does not differ in substance from the old comment, but emphasizes the importance of the lawyer consulting with the client about the appropriateness of appealing from any order or otherwise challenging any legal obligation to reveal client information.

New Comments [16] and [18] emphasize the lawyer's responsibility to act competently to safeguard client information, including employing appropriate law office procedures to guard against inadvertent disclosures of information related to client representation. Otherwise, the commentary to Rule 1.6, while expanded to cover new exceptions and modified for clarity, does not create any material substantive changes.

The supreme court has retained, in slightly modified form, old Indiana Rule 1.6(c), for which there is no ABA Model Rule counterpart, providing that disclosure of client names and files may be impliedly authorized to carry out the duties of a person managing a disabled lawyer's client files.

F. Rule 1.13 Organization as Client

Rule 1.13 generally addresses the special character of the relationship between lawyer and client when the client is not a natural person. Because the organizational client, of necessity, interfaces with legal counsel exclusively through agents (known as "constituents" in the parlance of Rule 1.13), a challenge faced by the lawyer is identifying and properly acting on information demonstrating that a corporate agent is engaging in misconduct that puts the organization's interests at risk. The corporate finance crises of recent years have highlighted the role of counsel for organizational clients to protect the organization against harm from rogue corporate agents. With respect to publicly traded corporations, Congress responded in the form of the Sarbanes-Oxley Act of 2002,⁹⁷ and the Securities and Exchange Commission responded in the form of regulations governing, among other things, professional conduct standards for lawyers.⁹⁸ This background was the catalyst for several significant amendments

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See [old] Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

IND. PROF. COND. R. 1.6 cmt. 20, 21 (1987).

97. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

98. 17 C.F.R. pt. 205 (2003).

to Rule 1.13.

When an organization's lawyer becomes aware of a risk of substantial injury imposed upon the organization by the conduct or inaction of a corporate agent, the lawyer's primary responsibility is to make sure that the agent's superiors in the organizational hierarchy are aware of the situation in order to take appropriate action. This is sometimes called "going up the ladder." Previously, Rule 1.13(b) was less directive and more advisory, suggesting going up the ladder as but one of several alternatives. As amended, Rule 1.13(b) mandates reporting up the ladder, including, if necessary, to the highest organizational authority, if a constituent is

engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.⁹⁹

Amended Comment [6] (formerly Comment [5]) clarifies that in order for a lawyer's obligation to be triggered, the organizational agent's action or inaction must be related to the lawyer's representation to the organization. However, it is not necessary for the lawyer's services to have been used in furtherance of the agent's misconduct. This does not mean, of course, that the lawyer is deprived of discretion to report up the ladder with respect to agent wrongdoing that the lawyer knows about but that is not related to the representation.

Another new development gives unprecedented authority for the organization's lawyer to "report out" in order to protect the interests of the organization as an entity. If the lawyer for the organization reports up the ladder, and superior organizational agents ratify the misconduct or fail to take timely and appropriate action, the lawyer may report the misconduct outside of the organization, but only as necessary to prevent substantial injury to the organization.¹⁰⁰ Significantly, the lawyer is authorized to report out even though Rule 1.6 otherwise protects the information from disclosure.¹⁰¹ However, if the lawyer has been hired to advise the organization or constituents of the organization about or defend them against alleged violations of the law, that lawyer does not have authority to report out.¹⁰²

A final amendment to Rule 1.13 provides that if an organization's lawyer is fired for or withdraws after taking action authorized by Rule 1.13 to protect the organization, the now-former lawyer is obligated to inform the organization's highest authority of the discharge or withdrawal, presumably including the reasons for the same.

New Comment [4] and amended Comment [5] (formerly Comment [4]) to Rule 1.13 expand upon the lawyer's obligation to take protective action when the

99. IND. PROF. COND. R. 1.13(b).

100. IND. PROF. COND. R. 1.13(c).

101. IND. PROF. COND. R. 1.13(c)(2).

102. IND. PROF. COND. R. 1.13(d).

conduct of an organizational agent puts the organization's interests at risk, discussing, among other things, when actions short of going up the ladder may be sufficient. Other new and amended commentary expands upon the new obligations and authority granted by Rule 1.13. New material has been added to the comment dealing with lawyers for government agencies indicating that in light of the public interest involved, "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified."¹⁰³ But the comment does not say what that different balance might be.

G. Rule 1.14 Client With Diminished Capacity

Previously described as a rule dealing with clients "under a disability," this new rule now refers to clients "with diminished capacity."¹⁰⁴ No change in substance was intended, but the new nomenclature more appropriately focuses on impairments that cause some diminution in the client's capacity to direct or otherwise interact with counsel. Rule 1.14(b) has been amended to specify the circumstances under which a lawyer should take protective action for the client, including when the client "is at risk of substantial physical, financial or other harm."¹⁰⁵ Whereas Rule 1.14(b) previously spoke specifically only about seeking the appointment of a guardian, it now specifies other protective action, including "counseling with individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."¹⁰⁶ New Rule 1.14(c) addresses the problems of confidentiality associated with enlisting proxy decision-makers for the client by providing that revealing information about the client to obtain assistance to protect the client's interests is impliedly authorized under Rule 1.6(a) to carry out the representation. But, the lawyer is cautioned by the same provision that the lawyer's obligation to protect the confidentiality of a client with diminished capacity is not otherwise reduced. Expanded commentary gives somewhat more guidance to lawyers in this inevitably difficult situation.

H. Rule 1.15 Safekeeping Property

Rule 1.15 addresses the duty of lawyers who act as financial fiduciaries over funds and property of others. The Indiana Supreme Court largely retained its formulation in Rule 1.15(b), permitting lawyers to maintain a "nominal balance" of the lawyers' own funds in their trust accounts. This is in contrast to new ABA Rule 1.15(b), which provides somewhat more guidance to lawyers by indicating that the appropriate purpose for holding lawyer funds in the trust account is limited to paying bank services charges on the account. The ISBA recommended that Indiana adopt the ABA version. New Comment [2] emphasizes the necessity

103. IND. PROF. COND. R. 1.13 cmt. 9.

104. IND. PROF. COND. R. 1.14.

105. IND. PROF. COND. R. 1.14(b).

106. *Id.*

to maintain account records that clearly identify the portion of a trust account balance that constitutes the lawyer's own funds.

Following the ABA Model Rule, Rule 1.15(c) is a new provision stating that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."¹⁰⁷ This language, to an extent, codifies the supreme court's holding in the recent case of *In re Kendall*,¹⁰⁸ but also raises the question whether flat or fixed fees must be deposited into trust until earned by some method of measurement. In *Kendall*, the court took great pains to explain that it was not changing its historical position that flat fees are earned upon receipt and do not need to be deposited into trust.¹⁰⁹ In light of the recency of *Kendall* and the seeming strength of the court's views on the handling of flat fees set forth therein, it is the author's view that the court did not intend by the new language in Rule 1.15(c) to signal a change in its views on handling flat fees.

Rule 1.15(e), formerly 1.15(c), has been amended to clarify one point and reinforce another. First, old Rule 1.15(c) required a lawyer to retain funds in trust that were in dispute between the lawyer and another person until the dispute is resolved. New language in Rule 1.15(e) requires that the lawyer keep funds in trust that are in dispute between "two or more persons" until the dispute is resolved.¹¹⁰ Any confusion about whether this rule applies to situations where the lawyer holds funds that are claimed by both the client and a third party is now resolved in favor of its application.¹¹¹ New Rule 1.15(e) also includes new language emphasizing the lawyer's obligation to promptly disburse to their rightful owner money or property that is not in dispute, even when some portion is disputed.

On a related note, apart from the Ethics 2000 project, in late 2004, the supreme court announced a change to the Interest on Lawyers Trust Account (IOLTA) program to require that all lawyers who maintain pooled trust accounts participate in the IOLTA program.¹¹² The court followed up on February 9, 2005 by amending Indiana Rule of Professional Conduct 1.15¹¹³ and Indiana Admission and Discipline Rule 23, section 21,¹¹⁴ effective July 1, 2005, to

107. IND. PROF. COND. R. 1.15(c).

108. 804 N.E.2d 1152 (Ind. 2004).

109. *Id.* at 1157-58.

110. IND. PROF. COND. R. 1.15(e).

111. Indiana case law has previously applied old Rule 1.15(c) to situations where the lawyer is a stakeholder of funds in dispute between a client and a third party, often a medical provider of a personal injury client. *See, e.g., In re Allen*, 802 N.E.2d 922 (Ind. 2004).

112. Press Release, Indiana Supreme Court, Legal Aid to the Poor Gets Boost from Supreme Court: Court to Adopt Universal IOLTA Plan (Nov. 23, 2004), available at <http://www.in.gov/judiciary/press/2004/1123b.html>.

113. Order Amending Rules of Professional Conduct (Feb. 2005), available at <http://www.in.gov/judiciary/orders/rule-amendments/2005/prof-conduct-r1.15-020905.pdf>.

114. Order Amending Rules of Professional Conduct (Feb. 2005), available at [http://www.in.gov/judiciary/orders/rule-amendments/2005/admis-disc-r23\(21\)-020905.pdf](http://www.in.gov/judiciary/orders/rule-amendments/2005/admis-disc-r23(21)-020905.pdf).

implement mandatory IOLTA participation.

I. Rule 1.16 Declining or Terminating Representation

Former Rule 1.16(b)(3), pertaining to the grounds for permissive withdrawal from representation, allowed a lawyer to withdraw from representation if the client insisted on an “objective” that the lawyer found to be repugnant or “imprudent.” As amended in now-Rule 1.16(b)(4), the basis for withdrawal applies not to disagreement over objectives, but to disagreement over “actions” to be taken on the client’s behalf, and mere imprudence is no longer the standard, rather “fundamental disagreement” is.

Rule 1.16(c) has been amended to include new language stating what should be obvious: a withdrawing lawyer “must comply with applicable law requiring notice to and permission of a tribunal when terminating a representation.”¹¹⁵

J. Rule 1.17 Sale of Law Practice

Amendments to the rule governing sale of a law practice create new options for both sellers and buyers that did not exist before. Whereas previously the selling lawyer had to sell the entire law practice and cease privately practicing law, now the selling lawyer may sell an entire “area of practice,” and is only required to cease private practice in the law practice area that was sold and in the same “geographic area” as the practice was conducted.¹¹⁶ Moreover, instead of being required, as before, to sell the entire practice to a single lawyer or law firm, the selling lawyer may sell the entire practice or area of practice to one or more lawyers or law firms.

Old Rules 1.17(c)(2) and 1.17(e), which permitted client fees to be increased as a condition of the client agreeing to transfer of the file to the purchasing lawyer, have been amended to preclude any increase in fees by reason of the sale.

A complicated issue in the sale of a law practice has been the need to obtain client consent to transfer files to the purchasing lawyer. Without client consent, Rule 1.6 prohibits disclosure of client information to a purchasing lawyer. New Rule 1.17(c)(3) addresses this problem by providing that a client’s consent to transfer of the file will be presumed if the client takes no affirmative action within ninety days of receiving notice of the proposed transfer. New language in the rule goes on to provide that in the event of inability to give actual notice to a seller’s client, transfer of the file to the purchasing lawyer may occur only upon authorization of a court. In camera disclosure of file information to the court is authorized, but “only to the extent necessary to obtain an order authorizing the transfer of a file.”¹¹⁷

115. IND. PROF. COND. R. 1.16(c).

116. IND. PROF. COND. R. 1.17(a).

117. IND. PROF. COND. R. 1.17(c).

VI. OTHER LAWYER ROLES

A. Rule 2.1 Advisor

Rule 2.1 remains substantially the same, but an amendment to comment [5] now cautions lawyers that, "when a matter is likely to involve litigation, it might be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."¹¹⁸

B. Rule 2.3 Evaluation for Use by Third Persons

Previously, Indiana Rule 2.3 allowed a lawyer to provide an evaluation of a client's affairs for the use of a third person when the lawyer reasonably believed that doing so was compatible with other aspects of the client-lawyer relationship and the client consented. Following new ABA Model Rule 2.3, our court has added a new Rule 2.3(b) cautioning the lawyer who provides the evaluation that, "[w]hen the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent."¹¹⁹ Whereas previously, explicit client consent was required for all lawyer evaluations for a third person, now, explicit client consent (albeit not necessarily in writing) is only required when the evaluation is likely to materially and adversely affect the client's interests.¹²⁰ This is one application of new language in Rule 1.2(a) authorizing the lawyer to take action on behalf of the client as impliedly authorized to carry out the representation.

The new language, together with expanded commentary, especially in Comment [5], emphasizes that in most circumstances when a lawyer provides an evaluation for a third party, the client's interests are manifestly served. In harder cases, where the lawyer's truthfulness in the evaluation, required by Rule 4.1,¹²¹ will expose the client to materially adverse consequences, the client should be informed of the consequences of exposure and given the opportunity to abandon the project that generated the need for the evaluation.

C. Rule 2.4 Lawyer Serving as Third-Party Neutral

Rule 2.4 is an entirely new rule, identical to ABA Model Rule 2.4, addressing the special role lawyers often fulfill when they serve as third-party neutrals. This rule does not purport to create ethical standards for third-party

118. IND. PROF. COND. R. 2.1 cmt. 5.

119. IND. PROF. COND. R. 2.3(b).

120. The Indiana State Bar Association's recommendation did not include the provision that is now IND. PROF. COND. R. 2.3(b), and it also recommended that the existing client consent provision be removed. Had this curious, but unexplained, recommendation been followed, lawyers would have been exposed to client claims that they were deprived of a choice between an evaluation harmful to their interests or backing out of the deal that required the evaluation.

121. See also IND. PROF. COND. R. 2.3 cmt. 4.

neutrals, rather it addresses the potential for role confusion that might arise when a lawyer serves as a third-party neutral. Rule 2.4(a) emphasizes that the lawyer-neutral does not stand in a lawyer-client relationship with any of the parties to the matter. Rule 2.4(b) requires that the lawyer-neutral “inform unrepresented parties that the lawyer is not representing them.”¹²² It expands on this duty by requiring the lawyer to amplify the lawyer-neutral’s role when faced with a party who manifests a misunderstanding. Helpful commentary has been added, including reminders that Rule 1.12 governs conflicts of interest involving former lawyer-neutrals¹²³ and that Rules 3.1 and 4.1 govern the lawyer-neutral’s duty of candor.¹²⁴

VII. LAWYERS AS ADVOCATES

A. Rule 3.1 Meritorious Claims and Contentions

In a clarifying amendment, the supreme court added the words “in fact and law” to the Rule 3.1 requirement that there be a non-frivolous basis for the prosecution or defense of legal proceedings. Comment [2] was amended to emphasize the lawyer’s affirmative duty to become informed of the facts and applicable law so as to avoid filing factually or legally frivolous pleadings. Language in Comment [2] has been eliminated that suggested that the lawyer has an obligation to refrain from pursuing a matter on behalf of a client whose motive is primarily to harass or maliciously injure another. Thus, the standard for frivolousness is the objective validity of the client’s claim, not the purity of the client’s heart. New Comment [3] points out that constitutional considerations may obligate lawyers for criminal defendants to pursue matters that they otherwise should not pursue under this rule.

B. Rule 3.3 Candor Toward the Tribunal

The basic structure of Rule 3.3 remains intact, but there have been several noteworthy changes. Rule 3.3(a) previously prohibited lawyers from knowingly making false statements of material fact or law to a tribunal.¹²⁵ The court removed the materiality provision so that any knowing false statement of fact or law to a tribunal violates the rule. In addition, the court imposed an obligation on lawyers to correct prior false statements of fact or law if they were material. Inasmuch as the ethical lawyer will not knowingly make a false statement of fact or law to a tribunal in the first instance, this provision will likely have application most often to the lawyer who unwittingly makes a false statement of fact or law and later learns that it was not true when made.

Former Rule 3.3(a)(4), now Rule 3.3(a)(3), addressed the lawyer’s duties to avoid sponsoring false evidence or to remediate the submission of false evidence.

122. IND. PROF. COND. R. 2.4(b).

123. IND. PROF. COND. R. 1.12 cmt. 4.

124. IND. PROF. COND. R. 1.12 cmt. 5.

125. “Tribunal” is defined in IND. PROF. COND. R. 1.0(m).

Previously, the lawyer's duty to act arose only when the lawyer directly sponsored the false evidence. Now, the lawyer's duty to act has been expanded to also include circumstances when false evidence is elicited on cross-examination from the lawyer's client or a witness called by the lawyer.¹²⁶ When false testimony is given under these circumstances, old Rule 3.3(a)(4) required the lawyer to take "remedial measures." Drawing upon text previously found only in the commentary, amended Rule 3.3(a)(4) now includes a provision that remedial measures include "if necessary, disclosure to the tribunal."¹²⁷

The ethical prohibition against offering false testimony still applies to testimony that the lawyer "knows"¹²⁸ is false. As before, but with one caveat, the lawyer retains discretion to refuse to offer evidence the lawyer "reasonably believes"¹²⁹ is false.¹³⁰ The caveat is that the court carved out a special exception in Rule 3.3(a)(3) for criminal defense lawyers who do not have the discretion to refuse to offer the testimony of their client if the lawyer reasonably believes, but does not know, that the testimony will be false. This last point was not without controversy within the court. In a dissent, Chief Justice Shepard opined that this was a bad idea that would detract from bench and bar efforts to build "public confidence and trust in the courts and the legal profession."¹³¹ Justice Dickson joined the Chief Justice's dissent.

Additionally, a new Rule 3.3(b) was added providing that:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.¹³²

This provision broadly imposes on all counsel a duty to take action at any time the lawyer knows of criminal or fraudulent conduct that has tainted or will taint a legal proceeding.¹³³

The commentary to Rule 3.3 has been modified to a considerable extent. Comment [1] clarifies that this rule applies to proceedings ancillary to a tribunal's adjudicative function, such as depositions. Comment [5] states that it is not a violation of this rule for a lawyer to establish a fact as a predicate to thereafter proving its falsity, such as one might do prior to impeaching a witness. Comment [6] provides that a lawyer may call a witness who is inclined to testify falsely on certain matters so long as the testimony is limited to matters the lawyer

126. See IND. PROF. COND. R. 3.3 cmt. 10.

127. IND. PROF. COND. R. 3.3(a)(4).

128. "Knows" is defined in IND. PROF. COND. R. 1.0(f).

129. "Reasonably believes" is defined in IND. PROF. COND. R. 1.0(i). "Reasonably" is defined in 1.0(h), and "believes" is defined in 1.0(a).

130. IND. PROF. COND. R. 3.3(a)(3).

131. See Order Amending Rules of Professional Cond. (Sept. 2004) (Shepard, C.J., dissenting).

132. IND. PROF. COND. R. 3.3(b).

133. See IND. PROF. COND. R. 3.3 cmt. 12.

knows are not false. Comment [9] notes that the local law of some jurisdictions may permit, with judicial approval, the use of narrative testimony of a criminal defendant, even though the lawyer for that defendant knows the testimony is false.¹³⁴ Much of the old, ambivalent commentary in former Comments [7] through [10] about anticipated or completed perjury of a criminal defendant has been eliminated in favor of the rule's black letter construction requiring the lawyer to implement the criminal defendant's decision to testify in all cases except when the lawyer knows the client will testify falsely. Comment [10] addresses the lawyer's obligation to act when a client or witness called by the lawyer (including a criminal defense client) surprises the lawyer by giving testimony the lawyer knows to be false or when, before the conclusion of the proceeding, the lawyer comes to find out that a client or witness called by the lawyer gave false testimony. The comment advises that the lawyer must remonstrate with the client or witness to correct the testimony, and failing that, disclose to the tribunal, even though revelation of the information would ordinarily violate the lawyer's confidentiality duties imposed by Rule 1.6. Comment [10] goes on to caution that withdrawal from representation under these circumstances will generally be ineffective if it leaves the false testimony uncorrected. Rule 3.3(c) imposes a duty on counsel to correct known, false testimony up to the conclusion of the proceeding, and in addition to Comment [13] clarifies that the conclusion of the proceeding occurs when there is a final judgment that has not been appealed or has been affirmed on appeal. Finally, a new Comment [15] discusses when a lawyer's actions in conformity with the obligations imposed by Rule 3.3 might require that the lawyer seek leave to withdraw from representing the client.

C. Rule 3.4 Fairness to Opposing Party and Counsel

Rule 3.4 is unchanged except for additional language in Comment [3] addressing a lawyer's obligation when coming into possession of physical evidence that implicates a client in a crime. Rather than clearly articulating the lawyer's duties under that circumstance, the comment merely refers to the fact that applicable law may allow the lawyer to take control of the evidence for a reasonable period of time to conduct non-destructive testing, but may thereafter be required by applicable law to turn the evidence over to law enforcement authorities. It is probably reading too much into this comment, which follows the ABA model, to suggest that it represents an affirmative statement by the Indiana Supreme Court of law on the subject.

D. Rule 3.5 Impartiality and Decorum of the Tribunal

The general prohibition on ex parte proceedings found in Rule 3.5(b) has been amended to permit an ex parte proceeding when authorized by court order

134. While the practice in Indiana's trial courts is unknown, there is no appellate authority in this state approving the narrative testimony method of dealing with known perjury by a criminal defendant.

in addition to, as previously, when authorized by law. New language also indicates that the prohibition on ex parte communications extends throughout the duration of a legal proceeding, but not beyond. A new, related Comment [2] has been added, but contributes little of substance.

Rule 3.5(c) is entirely new material dealing with post-trial communication with jurors or prospective jurors. Such communication is ethically prohibited when prohibited by law or court order, when a juror indicates that such communications are unwelcome, or when the communication involves "misrepresentation, coercion, duress or harassment."¹³⁵ A related Comment [3] has been added.

New Comment [5] points out that the prohibition in Rule 3.5(d) against disruptive conduct before a tribunal extends, as well, to conduct during a deposition.

E. Rule 3.6 Trial Publicity

Indiana's rule governing trial publicity previously departed from ABA Model Rule 3.6 to the extent that the Indiana rule purported to apply to all lawyers, regardless of whether they were participating in the case. This broad sweep of the rule raised some interesting, but untested, questions about the constitutionality of its application to Indiana lawyers who act as media commentators on trials of great public interest. Now amended to conform to language that previously existed and still exists in ABA Model Rule 3.6, Indiana Rule 3.6 now applies only to "[a] lawyer who is participating or has participated in the investigation or litigation of a matter."¹³⁶ Another conforming amendment, necessary because of the narrower application of the amended rule, appears in Rule 3.6(e), imputing the prohibitions of Rule 3.6 to all lawyers associated in a firm or government agency with the lawyers participating directly in the case.

Previously, the rule governing trial publicity applied a "reasonable person" standard to the question of whether a lawyer should have known that a statement would be publicly disseminated, but applied an actual knowledge (subjective) and "reasonable lawyer" (objective) standard to the question of whether the public statement would have a substantial likelihood of materially prejudicing the proceeding. Rule 3.3(a) now applies the actual knowledge and "reasonable lawyer" standard to both questions.

In another amendment that represents Indiana falling into line with the pre-Ethics 2000 ABA model rules, our supreme court has added new text to Rule 3.3(c) providing that the normal limitations on trial publicity are qualified when a lawyer's client is the target of trial publicity from an outside source. Rule 3.3(c) now states:

[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's

135. IND. PROF. COND. R. 3.5(c).

136. IND. PROF. COND. R. 3.6(a).

client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.”¹³⁷

In a significant departure from ABA Model Rule 3.6, and a departure from the recommendation of the ISBA, the Indiana Supreme Court has retained as Rule 3.6(d) a list of six categories of statements that are rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding. This same list appears in Comment [5] to ABA Model Rule 3.6, but without any reference to a rebuttable presumption.

F. Rule 3.7 Lawyer as Witness

No changes of substance appear in Rule 3.7, but the commentary has been amended to add several points of emphasis. First, throughout the comments new language has been added to stress that combining the roles of advocate and witness can be prejudicial to the tribunal, as well as to the opposing party. Comment [6] has been modified and new Comment [7] added to expand on the circumstances when an advocate’s testimony as a witness may also present a disqualifying conflict of interest under Rule 1.7 or Rule 1.9, thereby triggering an imputation of the conflict of interest to the law firm that does not otherwise apply in a pure advocate-witness scenario.

G. Rule 3.8 Special Responsibilities of a Prosecutor

Two changes to Indiana Rule 3.8 bring Indiana into conformity with ABA Model Rule 3.8 as it predated the Ethics 2000 process. First, the court added Rule 3.8(e) to impose special requirements on prosecutors who seek to subpoena lawyers to testify or produce evidence before a grand jury or criminal proceeding when the evidence relates to a past or present client. The requirements are that the prosecutor must reasonably believe that the information is not privileged, the evidence is essential to the success of the matter, and there is no feasible alternative. A related Comment [4] has been added.

Second, additional language was added to Rule 3.8(f) stating that, “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”¹³⁸ A related Comment [5] has been added, including a cross-reference to the applicable provision of Rule 3.6 governing trial publicity. Also, a new Comment [6] was added to explicate the prosecutor’s special responsibility, already recognized in the black letter rule, to use reasonable measures to exercise control over the extrajudicial statements of others involved in the prosecution function, including law enforcement personnel.

137. IND. PROF. COND. R. 3.3(c).

138. IND. PROF. COND. R. 3.8(f).

In Comment [1], language was removed that previously implied that grand jury proceedings are governed by Rule 3.3(d) pertaining to ex parte proceedings. Comment [2] was amended to caution prosecutors against seeking waivers of important pretrial rights from unrepresented defendants.

H. Rule 3.9 Advocate in Nonadjudicative Proceedings

No substantive changes have been made to the text of the rule. However, the commentary has been expanded to clarify that the rule has relatively narrow application to lawyers who represent clients in official hearings or meetings, and not to representation of clients in making applications or reports to government entities or in responding to government investigations or examinations of client affairs.

VIII. LAWYER RELATIONSHIPS WITH THIRD PARTIES

A. Rule 4.1 Truthfulness in Statements to Others

Indiana's only amendment to Rule 4.1 now brings the rule into conformity with the corresponding ABA model rule as it predated the Ethics 2000 project. Rule 4.1(b) now prohibits a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."¹³⁹ Previously, the rule simply required disclosure of "that which is required by law to be revealed."¹⁴⁰ In both instances, the prohibitions incorporate, albeit somewhat differently, law external to the rules.

Comment [1] to Rule 4.1 has been expanded to mention that half-truths and omissions that are the equivalent of affirmative misstatements will also violate the rule requiring a lawyer to refrain from false statements of material fact or law to third persons. Comment [3], concerning the challenges faced by lawyers whose clients are engaged in criminal or fraudulent conduct, has been significantly expanded. It refers to the lawyer's duties under Rule 1.2(d) to not assist a client in criminal or fraudulent conduct, and it advises that in some circumstances, simple withdrawal from representing the client may be inadequate unless the lawyer, without violating Rule 1.6, communicates the fact of withdrawal to others and disaffirms any work product that the lawyer unwittingly supplied in furtherance of the client's crime or fraud.

B. Rule 4.2 Communication With Person Represented by Counsel

Rule 4.2, pertaining to direct communications with a represented person, has been amended in two noteworthy ways. First, the prior reference to direct communications with a represented "party" has been replaced by reference to communications with a represented "person." This incorporates into the text of

139. IND. PROF. COND. R. 4.1.

140. IND. PROF. COND. R. 4.1 (1983).

the rule a concept that previously appeared only in the commentary to the rule, and clearly extends the rule to communications with represented persons who are not formally parties to a proceeding or other matter. The ABA made this change to Model Rule 4.2 several years before the Ethics 2000 process. Second, the text of the rule, which previously allowed an exception when the communication is authorized by law, has now been expanded to include communications authorization by court order, and related Comment [6] was added.

The court made important changes to the commentary to Rule 4.2, including an articulation of the rationale for the rule in new Comment [1]. New Comment [3] addresses how a lawyer should respond when it is the represented person who initiates the contact. In that event, the lawyer is instructed to immediately terminate the contact upon learning that it is from a person who is known to be represented in connection with the matter.

Comment [4] includes clarifying language on three points: First, Rule 4.2 does not prohibit a lawyer who has no client involved in the matter in question from speaking directly with a represented person. Examples of this include when a represented client seeks a second opinion or when a represented client consults with different counsel about taking over the client's representation. Second, a lawyer may not do indirectly what the lawyer may not do directly by using an agent or other intermediary to communicate directly with a represented person. And third, in recognition of the fact that represented clients may communicate directly with each other, a lawyer is not prohibited from advising the client concerning that client's direct communications with another represented person.

Arguably, the most important change to Rule 4.2 is in Comment [7], pertaining to lawyer communications with agents of an organization known to be represented by counsel. A long-standing debate has focused on how broadly or narrowly the umbrella of organizational protection should be drawn to keep organizational agents off limits to *ex parte* contacts. Previously, organizational agents who were off limits were, "persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."¹⁴¹ A reading of the language, "whose statement may constitute an admission on the part of the organization," together with the evidence rule governing vicarious admissions by party agents, Evid. R. 801(d)(2)(D),¹⁴² led to a common understanding that the rule kept large numbers of organizational agents off limits to *ex parte* contacts. Comment [7], as amended, replaces the category of "persons having a managerial responsibility," with the category of "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has

141. IND. PROF. COND. R. 4.2 cmt. (1987).

142. IND. EVID. R. 801(d)(2)(D) states: "A statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

authority to obligate the organization with respect to the matter.”¹⁴³ And it eliminates the category of any person “whose statement may constitute an admission on the part of the organization,” thus substantially narrowing the scope of the rule’s application to represented organizations. Comment [7] also advises that consent of counsel for the organization is not required before communicating with a former organizational agent, but cautions that any authorized *ex parte* contact with a former agent must not intrude on the legal rights of the organization.

C. Rule 4.3 Dealing With Unrepresented Persons

Drawing into the text of the rule a concept that was previously found only in the comment, Rule 4.3 now provides that a lawyer must not give legal advice, other than the advice to secure counsel, to any unrepresented person whose interests are known or reasonably known to the lawyer to be in conflict with the interests of the lawyer’s client. New language in Comment [1] further provides that a lawyer dealing with an unrepresented person will usually need to identify the lawyer’s client and, when necessary to avoid misunderstanding, explain that the client’s interests are opposed to the third person’s interests. A new Comment [2] expands on the rule and explicates the distinction between dealing with neutral third persons and third persons whose interests oppose the interests of the client.

D. Rule 4.4 Respect for Rights of Third Persons

Handling receipt of misdirected, confidential communications has increasingly become a topic of contention with the development of new means of instantaneous communication technology. The precise contours of a lawyer’s ethical duties upon receiving a misdirected communication from opposing counsel have been hotly debated. Following the ABA model, the court added Rule 4.4(b) to provide that the lawyer who receives a document that is known to have been misdirected has a duty to notify the sender. New Comment [2] emphasizes that the ethical duty begins and ends with notification, and any other obligations imposed upon the receiving lawyer are questions of law, not ethics. It also notes that the term “document” includes electronic communications. New Comment [3] indicates that a lawyer’s choice to return a misdirected communication unread, while not required by the rule or law, is a decision that should be reserved to the lawyer, rather than the client, as an exercise of professional judgment.

143. IND. PROF. COND. R. 4.2 cmt. 7 (2005).

IX. THE ORGANIZATION OF THE PRACTICE OF LAW

A. Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers; Rule 5.2 Responsibilities of a Subordinate Lawyer; and Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Together, Rules 5.1 through 5.3 describe duties of lawyers who act as supervisors or who are supervised. Each of these rules has been amended to replace the narrow concept of the traditional law partnership as the paradigm for describing law firm¹⁴⁴ hierarchies with more generic language applicable, as well, to professional corporations and other limited liability entities.¹⁴⁵ Also, Comment [2] to Rule 5.1 and Comment [2] to Rule 5.3 were added to emphasize the point that lawyers who function as managers must establish internal policies for all employees designed to assure compliance with the Rules of Professional Conduct.

B. Rule 5.4 Professional Independence of a Lawyer

Rule 5.4(a)(2) previously pertained only to compensation paid to a deceased lawyer's estate by a lawyer who completes unfinished cases, allowing compensation in an amount that fairly represents the deceased lawyer's pro rata contribution to the total work on a matter. This provision has now been expanded to conform the Indiana rule to ABA model rule language predating the Ethics 2000 project. With this amendment, the rule applies to completion of the legal work of lawyers who are deceased, disabled or have disappeared, and the compensation allowed to that lawyer's representative is the purchase price negotiated pursuant to the terms of Rule 1.17, governing sale of all or part of a law practice.

ABA Model Rule 5.4(a)(4) includes a new provision authorizing a lawyer to "share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter."¹⁴⁶ The Indiana Supreme Court chose not to include that language in Indiana Rule 5.4, but did not explain the reasoning behind its rejection. The reporter's notes for the ABA Ethics 2000 Commission explained that this provision codified ABA Formal Ethics Opinion 93-374 (1993), authorizing fee sharing in certain types of pro bono litigation. However, applying as it does to any not-for-profit organization, the new language in ABA Model Rule 5.4(a)(4) creates a broader exception to the general rule against fee sharing than did that ethics opinion. The court's rejection may signal its concern that the ABA rule's exception was too

144. "Law firm" is defined in Rule 1.0(c).

145. Admission and Discipline Rule 27 regulates the use of limited liability entities by lawyers for practicing law. Similar new language was added to Rule 5.4(d)(2), the rule prohibiting non-lawyer control of law firms, to clarify that it is the concept of control that is forbidden, rather than the specific title of corporate director or officer. And Rule 5.6(a), pertaining to agreements restricting the right of a lawyer to practice law, was similarly amended to update the nomenclature.

146. MODEL RULES OF PROF'L COND. 5.4(a)(4).

broad, or perhaps that the court did not want to provide special treatment for public interest litigation. In the end, it is fruitless to speculate about the meaning of a non-event, especially when that meaning may have five different variants, one for each justice.

C. Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

Previously dealing only with the unauthorized practice of law, the ABA, and now the Indiana Supreme Court, have used Rule 5.5 and its commentary as a platform for extensive rules governing multijurisdictional practice—the practice of law by lawyers in jurisdictions where they are not regularly admitted to practice. To date, only Indiana, Arizona, Delaware, Maryland and Oregon have adopted the ABA model rule provisions on multijurisdictional practice without substantial change.¹⁴⁷

Multijurisdictional practice is a topic that is far too rich to adequately cover in a brief summary. The ABA Center for Professional Responsibility follows the issue closely and has posted much useful information on its website.¹⁴⁸ The interested reader is encouraged to visit that site for more details.

The rules governing multijurisdictional practice recognize that modern law practice often involves litigation and transactional matters implicating more than a single jurisdiction. Law practice is increasingly regional, national and even international in scope. Still, the default position of the rule remains that non-Indiana lawyers may not engage in the practice of law in Indiana unless it is authorized. This means, among other things, that, unless otherwise authorized, a non-Indiana lawyer may not “establish an office or other systematic and continuous presence” for the practice of law in Indiana.¹⁴⁹ And a non-Indiana lawyer may not hold him or herself out as being admitted to practice in Indiana.¹⁵⁰

Non-Indiana lawyers are, however, authorized to engage in certain temporary or limited activities in Indiana. Rule 5.5(c) authorizes several categories of temporary activity in Indiana. First, temporary legal services may be provided in Indiana if undertaken in association with and active participation by an Indiana lawyer.¹⁵¹ Second, a non-Indiana lawyer may provide legal services in Indiana

147. See State Implementation of ABA Model Rules (May 12, 2005), at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.

148. See <http://www.abanet.org/cpr/mjp-home.html> (last visited Apr. 7, 2005).

149. IND. PROF. COND. R. 5.5(b)(1). The Indiana Supreme Court added the following sentence to Comment [4] to Rule 5.5 that does not appear in the comments to Model Rule 5.5: “For example, advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as systematic and continuous presence.” IND. PROF. COND. R. 5.5 cmt. 4.

150. IND. PROF. COND. R. 5.5(b)(2).

151. IND. PROF. COND. R. 5.5(c)(1). Indiana Admission and Discipline Rule 3 requires pro hac vice admission when a matter is before a tribunal.

that are in or reasonably related to a pending or potential legal proceeding, arbitration or other alternative dispute resolution matter in Indiana or elsewhere in which the non-Indiana lawyer is authorized or reasonably expects to be authorized to appear.¹⁵² One example of the application of this provision is that a foreign lawyer may enter Indiana in order to take a deposition of an Indiana witness in connection with litigation pending in the foreign lawyer's home state, without associating with Indiana counsel. And third, a non-Indiana lawyer may generally provide temporary legal services in Indiana that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."¹⁵³

Two categories of foreign lawyers are also authorized to practice law on an indefinite, albeit limited, basis in Indiana. First, a foreign lawyer in good standing may provide legal services in Indiana to his or her employer or an organizational affiliate of his or her employer so long as the services do not pertain to a matter in a forum that requires pro hac vice admission.¹⁵⁴ Thus in-house counsel may be present in and provide legal services to an employer without being regularly admitted to practice in Indiana. Comment [17] reminds in-house counsel that Admission and Discipline Rule 6, sections 2 through 5, dealing with business counsel licensure, will apply to in-house counsel who establishes an office or other systematic presence in Indiana. Second, foreign lawyers are generally permitted to practice law in Indiana to the extent authorized by federal law or other Indiana law.¹⁵⁵ So for example, by virtue of the supremacy of federal law, a foreign lawyer may engage in an Indiana law practice that is limited to the federally preempted field of immigration and naturalization law.

Extensive new commentary explicates the multijurisdictional practice provisions.

X. PUBLIC SERVICE RESPONSIBILITIES OF LAWYERS: RULE 6.1 PRO BONO PUBLICO SERVICE

The supreme court chose to retain its existing rule on pro bono services rather than adopt ABA Model Rule 6.1. As in the past, neither rule imposes an obligation to engage in pro bono activities, although it is strongly encouraged.¹⁵⁶

152. IND. PROF. COND. R. 5.5(c)(2)-(3).

153. IND. PROF. COND. R. 5.5(c)(4).

154. IND. PROF. COND. R. 5.5(d)(1).

155. IND. PROF. COND. R. 5.5(d)(1).

156. The old rule governing Indiana's voluntary attorney pro bono plan, Rule 6.5, remains the same, but has been renumbered as Rule 6.6.

XI. INFORMATION ABOUT LEGAL SERVICES: RULE 7.2 PUBLICITY AND ADVERTISING; RULE 7.3 RECOMMENDATION OR SOLICITATION OF PROFESSIONAL EMPLOYMENT; RULE 7.4 COMMUNICATION OF SPECIALTY PRACTICE; AND RULE 7.5 PROFESSIONAL NOTICES, LETTERHEADS, OFFICES, AND LAW LISTS

Notwithstanding the supreme court's inclination to follow the ABA model rules, in the area of publicity, advertising, and solicitation, the court rejected the corresponding ABA model rules and chose to retain its existing rules with minor modifications. Aside from renumbering the applicable rules,¹⁵⁷ the amendments largely take account of new communications technologies that did not exist or were not in common use when the Indiana Rules of Professional Conduct were first promulgated. Thus, Rule 7.3(a), prohibiting in-person solicitation, now includes "real-time electronic contact" as a prohibited method of direct solicitation; and Rule 7.3(c), governing targeted solicitations, includes electronic communications among the methods of communication regulated by that provision.

Another change to the rules on lawyer publicity includes a new exception in Rule 7.3(a) allowing in-person solicitation when the solicited person has a "family or prior professional relationship with the lawyer."¹⁵⁸ As in the past, targeted solicitation communications must be filed with the Disciplinary Commission at or prior to dissemination. But at the Commission's urging, the court included a fifty-dollar filing fee for each filing with the Commission. Because the use of targeted solicitations is pure economic activity, the filing fee was added in order to impose the Commission's administrative costs on the lawyers who choose to engage in that activity rather than have non-users subsidize those costs through their annual registration fees.

Rule 7.4 generally restricts the ability of lawyers to publicize that they specialize in a particular field of law unless they are certified as specialists under Indiana Admission and Discipline Rule 30. The court included an exception for lawyers admitted to practice before the United States Patent and Trademark Office and lawyers engaged in admiralty practice.¹⁵⁹

XII. PROFESSIONAL INTEGRITY

A. Rule 8.3 Reporting Professional Misconduct

Rule 8.3, governing the duty to report known, serious misconduct of another lawyer, remains substantially the same, with one exception. Unlike ABA Model Rule 8.3, Indiana Rule 8.3(c) now contains a reporting exemption for lawyers who obtain information about the misconduct "while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association

157. Former Rule 7.1 became Rule 7.2, former Rule 7.2 became new Rule 7.5, and Rule 7.1 was reserved for future use.

158. IND. PROF. COND. R. 7.3(a).

159. IND. PROF. COND. R. 7.4(c).

committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.”¹⁶⁰

B. Rule 8.4 Misconduct

Following the ABA model rule, the court amended Rule 8.4(e) by adding to the prohibition against stating or implying an ability to improperly influence a public agency or official an additional prohibition against stating or implying an ability to achieve results by illegal means or means that violate the Rules of Professional Conduct.

Indiana Rule 8.4(g) prohibits lawyers from engaging in conduct as lawyers that manifests bias or prejudice. This provision, which pre-dates Ethics 2000, was based on an ABA provision that appears in the comments to ABA Model Rule 8.4, not in its black-letter text. Comment [3] to ABA Model Rule 8.4 also provided that, “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.”¹⁶¹ Amended Indiana Rule 8.4(g) now includes this identical language in the text of the rule.

C. Rule 8.5 Disciplinary Authority; Choice of Law

The same influences that prompted the multijurisdictional practice amendments to Rule 5.5 were also the catalyst for amendments to Rule 8.5, establishing criteria for determining when and to whom Indiana’s disciplinary rules will apply. Rule 8.5(a) describes the scope of the court’s disciplinary jurisdiction, and includes any lawyer admitted to practice in Indiana, no matter where the conduct occurs, as well as any non-Indiana lawyer providing or offering to provide legal services in Indiana. The rule notes that application of this principal might simultaneously subject a lawyer to disciplinary authority in more than one jurisdiction.

Rule 8.5(b) establishes choice of law standards. If the conduct in question is in connection with a proceeding before a tribunal, the rules of the jurisdiction where the tribunal sits will apply.¹⁶² For conduct that is not in connection with such a proceeding, the rules of the jurisdiction where the conduct occurred or where the conduct has predominant effect will apply.¹⁶³ Indiana Rule 8.5(b)(2) differs from ABA Model Rule 8.5(b)(2) in that the ABA model rule includes the following safe harbor, whereas the Indiana rule does not: “A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”¹⁶⁴ Indiana’s commentary to Rule 8.5 deviates from the commentary to ABA Model Rule 8.5 in parallel with this difference, all the

160. IND. PROF. COND. R. 8.3(c).

161. IND. PROF. COND. R. 8.4 cmt. 3.

162. IND. PROF. COND. R. 8.5(b)(1).

163. IND. PROF. COND. R. 8.5(b)(2).

164. MODEL RULES OF PROF’L COND. 8.5(b)(2).

more reason for the states to have professional conduct rules that are as similar as possible.

XIII. SUMMARY

The amended Indiana Rules of Professional Conduct contain new provisions that will, to some degree, affect the professional life of every Indiana lawyer. Most of the changes are subtle, with the foundations and most of the superstructure of the old rules intact. The end result reflects the time, energy, and thoughtfulness of thousands of lawyers and judges nationally and in Indiana. While a point here or there might be debatable, the final product is clearly an improvement over that which came before—which was the goal when the ABA initiated the Ethics 2000 project in 1997.

XIV. CASE UPDATE

A. Attorney Fees

As noted in prior surveys on professional responsibility, the Indiana Supreme Court has been very active over the past several years in developing a body of cases that address a wide variety of ethical problems surrounding the charging and collection of legal fees. Recent cases include *In re Hebron*,¹⁶⁵ *In re Hailey*,¹⁶⁶ and *In re Kendall*.¹⁶⁷ Not long after *Kendall*, the supreme court decided another disciplinary action covering an important fee-related issue for the practicing bar: renegotiating the fee mid-representation. In *In re Breunig*,¹⁶⁸ the court was presented with a settlement proposal between the respondent lawyer and the Disciplinary Commission that resolved the case with a sixty-day suspension from the practice of law.¹⁶⁹ The first count of misconduct presented by the Disciplinary Commission involved the respondent's conflict of interest in protecting his fee claim against the client. Although the violation agreed to sounds in conflict of interest analysis, the facts grow out of the respondent's actions involving his fee.

In *Breunig*, the lawyer represented a client in connection with a marriage dissolution matter that took a considerable amount of time and involved litigation in both the states of Indiana and Florida. After about two years, the lawyer sent the client a bill for approximately \$385,000 for almost 2,000 hours of work and extensive expenses that included paying for the lawyers in Florida. Thereafter, the client paid about \$150,000 or about thirty-seven percent of the bill. At a later meeting, the lawyer obtained the client's signature on a promissory note for the

165. 771 N.E.2d 1157 (Ind. 2002).

166. 792 N.E.2d 851 (Ind. 2003).

167. 804 N.E.2d 1152 (Ind. 2004).

168. 810 N.E.2d 716 (Ind. 2004).

169. Count II of *Breunig* involved the lawyer's short-term romantic and sexual relationship with his client. This is, of course, serious misconduct in its own right but not the focus of consideration for this survey.

outstanding balance of the bill with the note's maturity date being the time of a property distribution and the accrual of eight percent interest on the outstanding balance. The respondent lawyer also obtained the client's signature on a writing termed an "assignment" that would assign to the respondent any outstanding balance from any property division settlement. In engaging in this negotiated resolution of his fee claim, he did not provide the client with a written disclosure of the terms of the transaction, tell the client to seek the advice of independent counsel or obtain her written consent.¹⁷⁰ All of these are terms required under Rule 1.8(a).¹⁷¹

Rule 1.8 is entitled, "Conflict of Interest: Prohibited Transactions"¹⁷² and the explanatory Comment for subdivision (a) is entitled "Transactions Between Client and Lawyer." Like the rest of the conflict of interest rules, this provision is clearly intended to protect the client from overreaching by the lawyer. The lawyer must explain the transaction in writing in a manner in which the client can understand what is being done. The client's consent must be obtained in writing as well. Under the 2005 version of the rule, the client's consent must be "informed consent." The Comment generally makes clear that this rule does not apply to ordinary transactions between the lawyer and the client where, for example, the lawyer uses the client's services for health care or real estate transfers. In those circumstances, the lawyer does not have any advantage over the client or other consumers of the client's products or services. The Comment to the revised rule also makes it plain that this rule does not necessarily apply to the lawyer's fee agreement with the client in the first instance. Hence, the problem in *Breunig* is highlighted. There is nothing in the disciplinary case to suggest that there was any problem with the fee agreement as it began and existed for at least a couple of years during the representation. The problematic transaction for the lawyer occurred when he took a promissory note from the client that was not contemplated by the original fee deal with the client. The promissory note was at interest and thereby increased the lawyer's compensation overall. One could argue that the client got a benefit from the deal as well: she did not have to make full payment immediately and did not have to find a new

170. *In re Breunig*, 810 N.E.2d at 716-17.

171. IND. PROF. COND. R. 1.8(a) provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

172. The Ethics 2000 amendments described earlier in this article changed the rule's title to "Conflict of Interest: Current Clients: Specific Rules" and the title to the Comment to "Business Transactions Between Client and Lawyer."

lawyer due to the respondent lawyer's withdrawal for the non-payment of his fee. These are true and valid observations that show that benefits inured to both sides of this transaction. The problem, despite the apparent fairness of the deal, is that the lawyer had an obligation to refer the client to independent counsel, which he did not do.¹⁷³ The Restatement gives a clear explanation of the rationale for the specific requirements for engaging in this conduct. One of the dangers is that the lawyer's skill and training will be used to arrange the form of the transaction such that his deeds and advice might work to the lawyer's interests rather than advancing those of the client. Proving such overreaching can be difficult so the law does not require such a showing on the part of the client.¹⁷⁴ Although all of this sounds in conflict of interest analysis, the focus is again on the calculation of fee charged and the means by which the lawyer tries to collect it. A clearer example of this overreaching is found in the *Hefron*¹⁷⁵ case mentioned earlier. For this and other misconduct, the lawyer in *Breunig* received a sixty-day suspension from the practice.¹⁷⁶

B. Misconduct by Prosecutors

Disciplinary action against a prosecuting attorney or a deputy prosecutor is generally quite rare. This is true even though prosecutors are held to a higher ethical standard than other members of the bar.¹⁷⁷ Most commonly, these kinds of cases involve some kind of alcohol related incident.¹⁷⁸ Occasionally, however, the misconduct is more significant. In one fairly recent case, an elected prosecutor was disbarred for deliberate and ongoing misconduct.¹⁷⁹ Conduct that aberrant, of course, is the exception rather than the rule.

During the relevant period to this work, the respondent lawyer in *In re Ryan*,¹⁸⁰ served as a part-time deputy prosecuting attorney in the Goshen City

173. RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS (2000), §126, cmt. (a) notes that in civil actions and disciplinary actions involving this rule, the lawyer has the burden of persuading the tribunal that the transaction was fair and reasonable and that the client was adequately informed.

174. *Id.* cmt. (b).

175. *Hefron*, 771 N.E.2d at 1162-63.

176. *In re Breunig*, 810 N.E.2d at 717.

177. See *In re Oliver*, 493 N.E.2d 1237 (Ind. 1986). The respondent lawyer was involved in a one-car crash and was charged with driving while intoxicated. At the time of his arrest, he was a special prosecutor in one case. In imposing a public reprimand on the lawyer, the supreme court noted, "[a]s officers charged with administration of the law, their own behavior has the capacity to bolster or damage public esteem for the system different than that of attorneys otherwise in practice." *Id.* at 1242.

178. See, e.g., *In re Schenk*, 612 N.E.2d 1059 (Ind. 1993); *In re Seat*, 588 N.E.2d 1262 (Ind. 1992).

179. *In re Riddle*, 700 N.E.2d 788 (Ind. 1998) (Extensive misconduct, including the sham hiring of a deputy prosecutor employed only to run his private practice law office, warranted disbarment.).

180. 824 N.E.2d 687 (Ind. 2005).

Court.¹⁸¹ Based on his work as a prosecutor, he observed that many Latino motorists were being charged in his court with driving without licenses¹⁸² or driving without a license in possession.¹⁸³ The court generally permitted the state to reduce the original charge to a lesser charge or an ordinance violation if the defendant provided proof of a valid driver's license.¹⁸⁴ The lawyer and his wife started a business called Legal Licensing Limited, hereinafter referred to as LLL. The respondent lawyer's wife was the only employee of LLL and for \$275, LLL would obtain international driver's licenses for their customers. The city court's Spanish language interpreter received \$20 for each customer she referred to LLL.¹⁸⁵ The interpreter would deliver the customer's initial \$100 payment to the lawyer, often near the court. Once the driver's license was obtained, it was exchanged with the defendant for the balance of the fee. The defendant would then present the license to the respondent lawyer in open court and, in return, the lawyer would amend the initial charge to a lesser charge. He collected over \$20,000 in fees from about 150 customers during the 14 months or so that the business operated. In early 2002 he met with the elected prosecutor about his involvement in LLL and resigned his position immediately thereafter.¹⁸⁶

The supreme court found that the respondent lawyer violated one of the conflict of interest rules, Rule 1.7(b).¹⁸⁷ It held that the lawyer's own interest in operating and profiting from LLL was in direct conflict with the lawyer's duties as a deputy prosecutor.¹⁸⁸ When applied to the terms of the rule, it is evident that the State of Indiana's interests were coming in second place to the lawyer's interest in keeping his sideline going. In its opinion, the court dwelt on the lawyer's failure to not just do his duty of loyalty to the State of Indiana, but his failure to even recognize what that duty was. The court used the opinion to remind lawyers in general and prosecutors in particular that deputy prosecutors serve a public trust to enforce the law and the state is entitled to that lawyer's undivided loyalty. Conduct like that at issue in this case breeds mistrust and lack

181. Goshen is in Elkhart County in northern Indiana.

182. A class "C" misdemeanor.

183. A class "C" infraction.

184. 824 N.E.2d at 688.

185. *Id* at 689.

186. *Id*.

187. The rule in effect at the time provided:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected: and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

188. *Ryan*, 824 N.E.2d at 689.

of confidence in the judicial system.

He used his position as a deputy prosecutor to obtain a significant financial windfall for himself. By serving both as prosecutor and as intermediary for those seeking a favorable plea agreement, respondent gave the impression that justice could be bought.¹⁸⁹

The court acknowledged that the lawyer had admitted all the requisite facts, but expressed some level of dismay at his perceived "failure to grasp the magnitude of his misconduct."¹⁹⁰ He attached a paper to his affidavit consenting to discipline that spoke to the validity of the international driver's licenses and their propriety in the context of plea bargaining cases. The court thereafter pointed out to him that a lawyer cannot ethically prosecute a criminal defendant while simultaneously privately providing that defendant with a business service to help him obtain a more favorable result in his criminal case.¹⁹¹ For that misconduct, the lawyer received a nine month suspension from the practice of law with the opportunity to petition for reinstatement to the bar thereafter.¹⁹²

Use of the governmental office of prosecutor to facilitate a lawyer's private endeavor is, indeed, rare conduct. The last such case was *In re Riddle*¹⁹³ in 1998.

The message that should be obvious from this case is that prosecutors (and, in particular, part-time prosecutors and deputies) can have business endeavors outside their role as State officials, but those endeavors must not permit them to profit at the expense of the State's interests. The closer these outside business endeavors are to the heart of the prosecutor's work in the criminal justice system, the stronger the inference that the conduct might be problematic as being in conflict with the lawyer's oath to the State of Indiana. Again, this kind of conduct is rare, but not unheard of.

C. Judicial Misconduct

In a judicial discipline case, the supreme court removed a sitting Lake Superior Court judge from the bench for misconduct that included, inter alia, harming litigants in her court by failing to issue timely orders in their cases. In *In re Kouros*,¹⁹⁴ the judge had been appointed to the bench in 1997. Between 1999 and 2001, she had pronounced sentence orally in at least thirty-five felony cases in which she failed to issue written sentencing orders promptly thereafter.¹⁹⁵ In five cases she delayed the orders by five to six months. In one

189. *Id.*

190. *Id.*

191. *Id.* at 690.

192. IND. ADMIS. DISC. R. 23, § 3(a) provides, in essence, that any lawyer suspended for six months or more must petition the supreme court and demonstrate their fitness to return to the practice of law.

193. 700 N.E.2d 788 (Ind. 1998).

194. 816 N.E.2d 21 (Ind. 2004).

195. *Id.* at 23.

case, she delayed by ten months. In three cases, she delayed the orders by fourteen or fifteen months and in one case, she delayed the order by twenty-seven months!¹⁹⁶ In 2001, the supreme court directed the other Lake County judges to review the delays and ascertain the scope of the problem. If they determined that a real problem existed, they were to issue a plan to correct it.¹⁹⁷ The reviewing judges reported that there were 330 files in the respondent Judge's office awaiting orders and subsequent return to the clerk's office. Those judges concluded that the respondent judge had initiated a new method for transcribing and processing docket entries contemporaneously with the making of the entries in open court and the backlog should not occur in future cases. Such transcription equipment was not installed until almost two years later.¹⁹⁸ Despite repeated communications from the counsel for the Commission on Judicial Qualifications, the respondent judge did not correct the problems and in October 2002, the supreme court issued an order instructing the Director of Indiana's Division of State Court Administration ("DCSA") to monitor the respondent judge's case processing.¹⁹⁹ Needless to say, the situation continued unabated and, in April 2003, DCSA staff visited the respondent's office and discovered 171 one cases checked out from the clerk's office and languishing in the respondent's judge's office. The judge was temporarily removed from office and a judge pro tempore was appointed to serve in her stead.²⁰⁰ A formal judicial disciplinary proceeding was begun shortly thereafter charging the respondent judge with more than seventy counts of misconduct under the Code of Judicial Conduct.²⁰¹ The matter was heard by three Masters in April 2004 and the supreme court's opinion removing the judge from office was entered October 12, 2004.

In its opinion, the supreme court acknowledged that the respondent judge did not involve any issues of moral turpitude or misuse of her judicial power for personal gain. The court also examined her extensive physical problems and noted she was also remorseful and apologized.²⁰² The court gave long consideration to the factors that weighed against the judge, however. She was no novice to the bench and had been given opportunity after opportunity to correct the problem and improve her methods of judicial administration. These included repeated warnings about the problems she was causing.²⁰³ In the end, the supreme court was cautious to express that judicial disciplinary proceedings are not designed merely to punish wrongdoing, but they ensure judges are fit for judicial duty, maintain public confidence in the administration of justice and preserve the integrity and independence of the judiciary. In ordering her removal

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 24.

200. *Id.* at 26.

201. *Id.* at 282-9.

202. *Id.* at 30.

203. *Id.*

from office, the court postponed the effective date of the removal to permit her to receive judicial pension benefits when she reaches the appropriate age.²⁰⁴

Features of particular note in this case unrelated to the attention-getting nature of the misconduct overall include the court's Job-like efforts to patiently permit this particular court the opportunity to get itself back on track. The use of other local Lake County judges to monitor and assist the respondent judge to develop methods for ensuring the proper administration of cases moving through the court including repeated admonitions from the Commission on Judicial Qualifications.²⁰⁵ Even after a temporary suspension, the judge was permitted back on the bench for a final try and getting the management issue right. Despite what appeared to be profound problems with the court's file administration system, the supreme court went to remarkable lengths to reduce the disruption within the county's judicial system.

204. *Id.* at 31.

205. *Id.* at 23. One letter advised her that although the Commission's inquiry had been closed without prejudice, it would be reopened if her organizational problems recurred and she should, "maintain scrupulous attention to the processing of cases and . . . not allow your office to appear to be in disarray." Such disarray, she was warned, left the impression that the court's docket is in a similar state.

A SURVEY OF PROFESSIONALISM AND CIVILITY

TIM A. BAKER*

INTRODUCTION

U.S. Supreme Court Justice Sandra Day O'Connor wrote in her memoirs, "[f]ew Americans can even recall that our society once sincerely trusted and respected its lawyers."¹ U.S. Magistrate Judge V. Sue Shields of the Southern District of Indiana similarly lamented in a written opinion:

The magistrate judge, having spent forty years as a judge in this state, recalls a time when law was practiced with civility and grace; a time when simple disputes were resolved by a telephone call and agreements between counsel were sealed with a handshake; a time when disputes not so resolved were brought before the court in a manner that minimized expense and strife, recognizing that reasonable people can, at times, reasonably disagree. As the instant dispute so clearly demonstrates, that time is no more. The magistrate judge mourns its passing.²

These respected jurists' observations support the conclusion that in Indiana, and throughout the nation, the image of lawyers and the legal profession has spiraled downward—and not necessarily undeservedly.

While lawyer bashing is nothing new,³ it is imperative that those who care about the legal profession obtain a better understanding of the root causes of these problems. Doing so will allow for more effective steps to be taken to address and correct these issues. To that end, the Indianapolis Bar Association ("IBA") recently conducted an online survey to examine the image of attorneys and the legal profession.⁴ This Article examines the eye-opening results of that

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1. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 226 (Craig Joyce ed., 2003).

2. *Paul Harris Stores, Inc. v. Pricewaterhouse Coopers LLP*, No. 1:02-CV-1014-LJM/VSS, slip op. at 1 (S.D. Ind. Jan. 31, 2005).

3. In England, people had a low opinion of lawyers for hundreds of years before the colonizing of America, and in colonial America "there was even more hostility toward lawyers than there was in England." Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1409 (1999).

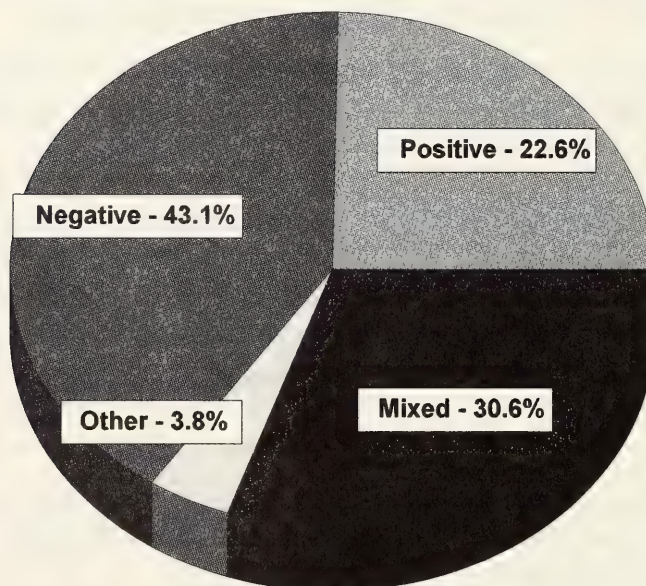
4. The origins of this survey stretch back to 2001, when the IBA formed a Task Force on Image Enhancement to study and address potential challenges caused by negative public opinion of, or a lack of confidence in, the legal profession. On November 27, 2002, the Task Force issued its final report, which was subsequently approved by the IBA Board of Managers. This author served on this Task Force and was subsequently appointed as the IBA's first Professionalism Coordinator, and in this capacity coordinated the survey that is the subject of this Article. A copy of the Task Force's final report is posted on the IBA's website, located at <http://www.indybar.org/files/ImageEnhancementFinalReport.pdf>.

survey, its suggestions for improvement, and related aspects of professionalism and civility.

I. SURVEY SAYS: LAWYERS' IMAGES SUFFER

In April 2004, the IBA initiated an online survey to measure the image of lawyers and the legal profession. The survey was not designed to be a "scientific analysis," but rather as a "snapshot of problems recognized by lawyers and the general public."⁵ By the time the survey concluded on December 31, 2004, 459 people had responded. The results of the survey are illuminating and troubling. Respondents were asked to describe their general impression of lawyers. The chart below summarizes the responses.⁶

General Impression of Lawyers



As the foregoing reveals, 43.1% of the respondents had a negative impression of lawyers. Typical negative terms used to describe lawyers included: not trustworthy; greedy; arrogant; unethical; expensive; thieves; cold-hearted;

5. Brent Adams, *Law Group Taking Stock of Public Perception*, INDIANAPOLIS BUS. J., June 28, 2004, at 19A.

6. The results of that survey are contained in a final report dated February 28, 2005, submitted by this author to the IBA Board of Managers. All information contained in this Article regarding the findings of the survey is extrapolated from that final report. Tim A. Baker, Final Report on the IBA's Survey on the Image of Lawyers (Feb. 28, 2005) [hereinafter Baker, Final Report], available at <http://www.indybar.org/files/FinalReportonIBAProfessionalsSurvey.pdf>.

money-grubbers; and shysters. One of the more mordacious comments elicited by the survey was, "I have worked for 2 law firms in my time and only came across one [attorney] who was not crooked."⁷ Such a statement—while exceedingly harsh given the integrity and honesty demonstrated by many lawyers—nevertheless reflects a viewpoint that cannot be discounted or dismissed out of hand.

On the contrary, the survey revealed that only 22.6% of the respondents held a positive image of attorneys. Typical positive terms used to describe lawyers included: hard-working; intelligent; trustworthy; help people resolve complex issues; compassionate; professional; active in the community; honest; creative advocates that instigate change; noble profession; problem solvers; smart and assertive. These favorable descriptions labeled lawyers as problem solvers who are "professional and capable."⁸

Slightly more than 30% of the survey responses are properly characterized as "mixed"—some good, some not so good. These mixed responses tabbed lawyers as "both feared and revered" and "knowledgeable but arrogant." As one respondent succinctly put it, "Some are saviors, others are bottom-feeding bloodsuckers." A less pointed response noted, "Until I worked for them, I had a very negative image of them. Now, I realize that they are unfairly maligned, due to the actions of a few bad apples in the profession."⁹

Another respondent compared lawyers to members of Congress.¹⁰ According to this survey response, "I believe lawyers are viewed like Congress. Everyone complains about them but rarely do those complaints include the lawyers they know or have worked with personally. Incumbent Congress persons are reelected at least in part because most voters view their guy or gal as an exception to the rule."¹¹ This comment foreshadows a common theme noted below: people like their own lawyers; it's everyone else's lawyers who seemingly cause problems.

It is not enough to conclude that lawyers and the legal profession have an image problem.¹² Such a conclusion was fairly obvious even without the benefit of a survey. As mentioned earlier, the paramount purpose is to understand the

7. *Id.* Another respondent decried that lawyers "tend to bill worse than telephone companies." Another respondent observed that lawyers are "too busy to do a good job for each individual client." Other unflattering terms directed toward lawyers included slick, slimy, good ol' boys club, unethical, and sneaky. *Id.*

8. *Id.*

9. *Id.*

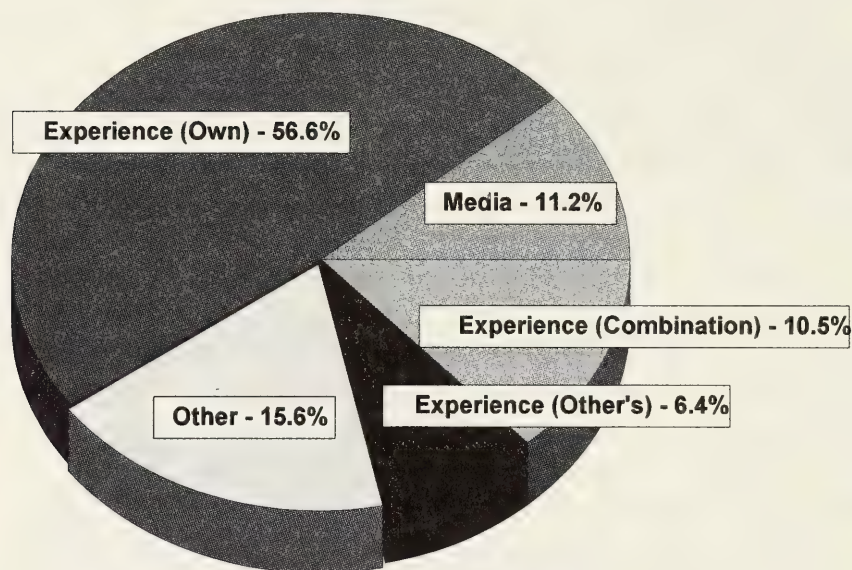
10. Such a comparison is not altogether surprising given the number of lawyers who are serving, or have served, in Congress.

11. Baker, Final Report, *supra* note 6.

12. The legal profession holds no monopoly on incivility. One need look no further than the National Basketball Association (NBA) to confirm this. On November 20, 2004, an on-court altercation during an NBA game prompted a fan at the game to throw a beverage on Indiana Pacer player Ron Artest. Artest responded by going into the stands, and a fist-flying melee resulted. When the smoke cleared, player suspensions, criminal charges, and other consequences followed. Jeff Rabjohns, *Fans Think Punishment Is Too Harsh*, INDIANAPOLIS STAR, Nov. 22, 2004, at D1.

root causes of these problems so as to permit more effective steps to be taken to address and correct these issues. So what did the survey show?

Primary Reason for Impression



As the foregoing chart vividly demonstrates, respondents' personal experiences with attorneys and the legal profession were the most frequently reported basis for the opinions held. In response to a separate question, the survey also revealed that 76.5% of the respondents believed that their impression of the image of lawyers is shared by the public in general. Combining these findings leads to the conclusion that nearly half of the respondents have a negative impression of lawyers, that this impression more often than not is based on the respondents' personal experiences, and that more than three-fourths of the respondents believe others feel the same way. One respondent wryly noted that "people laugh when someone says they are a lawyer, as if that alone is the punch line of a joke." Or as another respondent recounted, "everyone cringes when I tell them I am in law school."¹³

On the other hand, other respondents recognized that negative views of lawyers are far from universal. The two comments set forth below aptly demonstrate this fact:

I believe that my impressions are shared by some and not by others. Lawyers have a reputation for being greedy bottom feeders. I feel that although that applies to some lawyers, lawyers are individuals and most

13. Baker, Final Report, *supra* note 6.

are true professionals.

If the client gets a good result, then they are happy; if not, they feel the attorney is incompetent.¹⁴

This latter comment hits on yet another root cause of negative lawyer impressions: people who need a lawyer frequently are in a state of personal or family strife. The lawyer suddenly becomes a valued ally to someone who finds him or herself in jail. Divorce, loss of a job, bankruptcy, personal injury, or death can be tragic and traumatic events requiring the services of a lawyer. As one survey respondent appropriately remarked, “No one comes to an attorney because they are having a good day (unless you won the lottery and you need a tax planner). So it’s hard to sell.”¹⁵ Thus, even the most civil and professional lawyers and legal system would undoubtedly produce some disappointment, frustration, and displeasure.

Personal experiences of course are not the only bases for these negative perceptions. The media also was identified 11.2% of the time as the source of these impressions. Picking up on this theme, one respondent stated, “I think the media does a great disservice to the image of lawyers. They are shown as greedy, selfish and arrogant. They are lampooned frequently, and the public is encouraged to gloat when lawyers are hurt or embarrassed.”¹⁶

One powerful example of media lampooning of lawyers and the legal profession is found in the popular television show “The Simpsons.”¹⁷ In this long-running series, Chief of Police Clancy Wigum is drawn to closely resemble a pig and is plainly incompetent.¹⁸ Lionel Hutz is the ambulance-chasing trial lawyer who carries nothing more in his briefcase than a newspaper and an apple core, and is described as a “shyster” who instinctively rises every time he hears a siren.¹⁹ And in one memorable episode, Homer Simpson is the lone holdout in the jury room in an allusion to the classic film “Twelve Angry Men”—only Homer is not holding out because he believes the defendant is innocent, but rather to continue his sequestration in a hotel with free cable television.²⁰

14. *Id.*

15. *Id.*

16. Three additional survey responses are also worth noting: (1) “I think the public never really gets to know lawyers on a personal basis, just their public image or what they see in the media.” (2) “The public in general make television shows about lawyers highest in the ratings.” (3) “People’s opinions are framed by their own experiences, as well as outside influences like the media.” *Id.*

17. For an excellent discussion of how “The Simpsons” has affected perceptions of the law and the legal system, see Kevin K. Ho, “*The Simpsons*” and the Law: *Revealing Truth and Justice to the Masses*, 10 UCLA ENT. L. REV. 275 (2003). The article is as humorous as it is thought provoking.

18. *Id.* at 279.

19. *Id.* at 285.

20. *Id.* at 286.

Recurring media images such as these, repeatedly broadcast into homes throughout the country by way of a hugely popular or long-running television series, reinforce negative views of the law and those who operate in the legal system.

Any discussion of the media would be incomplete without mentioning the sometimes misleading and inaccurate news coverage of the legal system. One example from the survey period is particularly noteworthy. On June 23, 2004 the *Indianapolis Star* ran an article under the headline, "Disabled worker awarded \$4.6 million."²¹ The article described a jury verdict in the Southern District of Indiana in which a jury returned this award against Daimler-Chrysler because the company refused to let a disabled plaintiff do certain jobs.²² While the jury did in fact make this award (specifically, the jury awarded her \$100,000 in compensatory damages and \$4.5 million in punitive damages), the statute under which the woman brought suit—the Americans with Disabilities Act—caps compensatory and punitive damages awards at \$300,000.²³ Yet nowhere did the article mention this cap. Nor does it appear that the *Indianapolis Star* ran an article regarding the trial judge's decision to reduce the award of compensatory and punitive damages, consistent with this cap, to \$300,000.²⁴

Thus, the media's coverage of this court proceeding would lead the public to conclude that a plaintiff in a fairly routine employment discrimination case recovered an excessive multi-million dollar verdict. In fact, the actual award—while still significant—was significantly smaller than originally reported. This skewed coverage likely was not intentional; reporters operate on tight deadlines, have limited copy space or air time, and have no easy method of keeping tabs on when a judge might issue a significant post-judgment modification to a jury award. Nevertheless, this example demonstrates how erroneous news coverage of legal proceedings can feed the public's negative perceptions of lawyers and the legal system.

The media—not unlike lawyers—is an easy target. It would be simple to single out the media as the driving force in the public relations debacle in which lawyers find themselves. Putting significant blame at the media's feet, however, would be disingenuous. As the survey revealed, the media was held out as the culprit of negative images only 11.2% of the time. Therefore, it is reasonable to conclude that the media is only minimally responsible for lawyers' image predicament. Rather, the current, undesirable state of affairs seems to be largely of the legal profession's own making.²⁵

21. Fred Kelly, *Disabled Worker Awarded \$4.6 Million*, INDIANAPOLIS STAR, June 23, 2004, at B1.

22. *Id.*

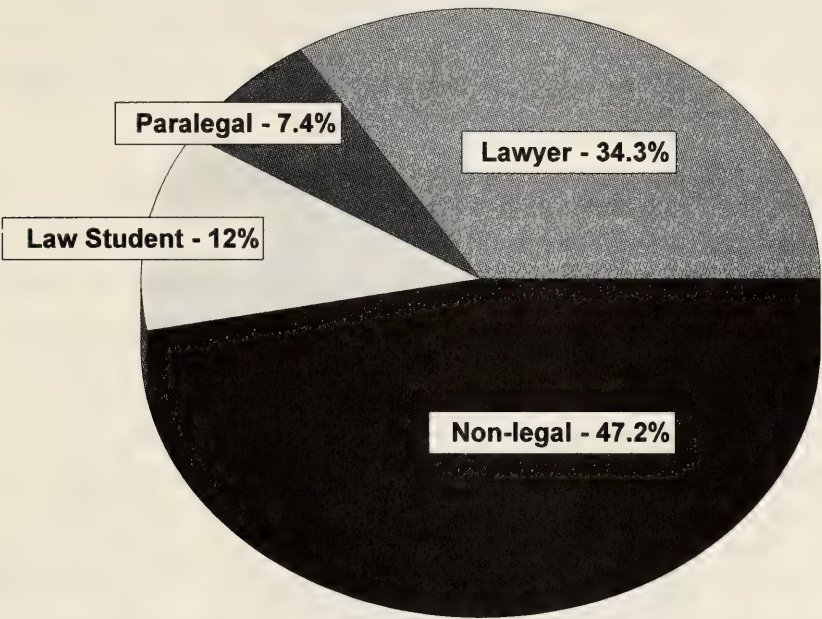
23. See 42 U.S.C. § 1981a(b)(3)(D) (2000).

24. *Young v. Daimler Chrysler*, No. IP 01-0299-C-M/S (S.D. Ind. June 30, 2004) (Entry of Judgment).

25. Judges are not to be excluded from the negativity associated with the legal profession. Judges are likely held to a higher standard than lawyers in the public eye, and when judges stumble the negative fallout on the legal profession can be significant. During the survey period, the media

The survey also inquired into the occupations of the respondents. The chart below reveals the findings.

Occupation of Respondents



Thus, survey respondents were split fairly evenly between persons with law-related backgrounds and non-legal types. Even more interesting, however, is an examination of the views these different groups of respondents held regarding the image of lawyers. The following table is illustrative:

	Positive	Negative	Mixed
Paralegals	20.8%	28.6%	50.4%
Law Students	56.8%	17.6%	24.8%
Non-Legal	17%	50.8%	33%
Lawyers	25.7%	35.5%	38.7%

As this table reveals, non-legal respondents most often (50.8%) held a negative image of lawyers. Lawyers were the next most frequent group (35.5%)

carried numerous stories about judges’ alleged missteps. *See, e.g.,* Abigail Johnson, Lake County Judge Removed, IND. LAW., Oct. 20, 2004, at 3; Vic Ryckaert, *Judge Receives Private Discipline*, INDIANAPOLIS STAR, Aug. 10, 2004, at A1; Kevin Corcoran, *High Court Judge Steps Down from Penalty Case*, INDIANAPOLIS STAR, Nov. 7, 2003, at B5.

to hold such a view. Law students overwhelmingly (56.8%) held the most positive view of lawyers, followed distantly (25.7%) by lawyers. Not surprisingly, non-legal respondents were the least likely (17%) to report a positive view of lawyers. These results suggest that efforts to improve the image of lawyers and the legal profession should be targeted primarily to non-lawyers, but that any such efforts would likely fall short unless lawyers—who often view other lawyers unfavorably—are also targeted. In addition, since law students held the most positive view of lawyers, this idealism can perhaps be harnessed and nurtured for the overall benefit of the profession.

II. COMMON THEMES AND SUGGESTIONS FOR IMPROVEMENT

The survey uncovered several common themes. These include: people like their own lawyer, but not other lawyers; lawyers are money-driven and greedy; high profile cases bring out the worst in lawyers and the legal system; lawyers do not return telephone calls or care about the client;²⁶ and there are too many frivolous cases. Of all the themes revealed by the survey, the notion of frivolous litigation seemingly most concerned respondents. As one survey response stated, “[t]he public seems to believe that attorneys are mostly out for themselves and trying to make money and create claims where there weren’t claims before.”²⁷

The case most often mentioned among respondents bemoaning frivolous litigation was “the McDonald’s coffee case.” This is the case in which Stella Liebeck won a jury verdict of about \$2.9 million against McDonald’s after she was burned by spilling scalding hot coffee on herself.²⁸ Liebeck has been described as the “poster lady” for tort reform,²⁹ even though by one account: (1) Liebeck received second and third degree burns from the coffee, was hospitalized for seven days, and underwent skin grafts; (2) McDonald’s had received 700 burn complaints in the 10 years prior to the incident; and (3) the judge lowered the award to \$640,000.³⁰ Picking up on this theme of misinformation, one survey respondent did state, “[The public] is not educated. For example, everyone talks about the woman that sued McDonald’s because of the hot coffee burn. But nobody knows that McDonald’s had been warned on many instances before that

26. For an egregious example of this, see *In re Davidson*, 814 N.E.2d 266 (Ind. 2004) (disbarring counsel for accepting retainers and/or filing fees and then taking little or no action and failing to respond to clients’ inquiries about their cases).

27. Baker, Final Report, *supra* note 6.

28. *Liebeck v. McDonald’s Restaurants*, No. CV-93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994).

29. Her case even prompted the creation of the “Stella Awards,” which recognize what are described as the most frivolous lawsuits in the United States. For more information about these awards, visit <http://www.stellaawards.com>.

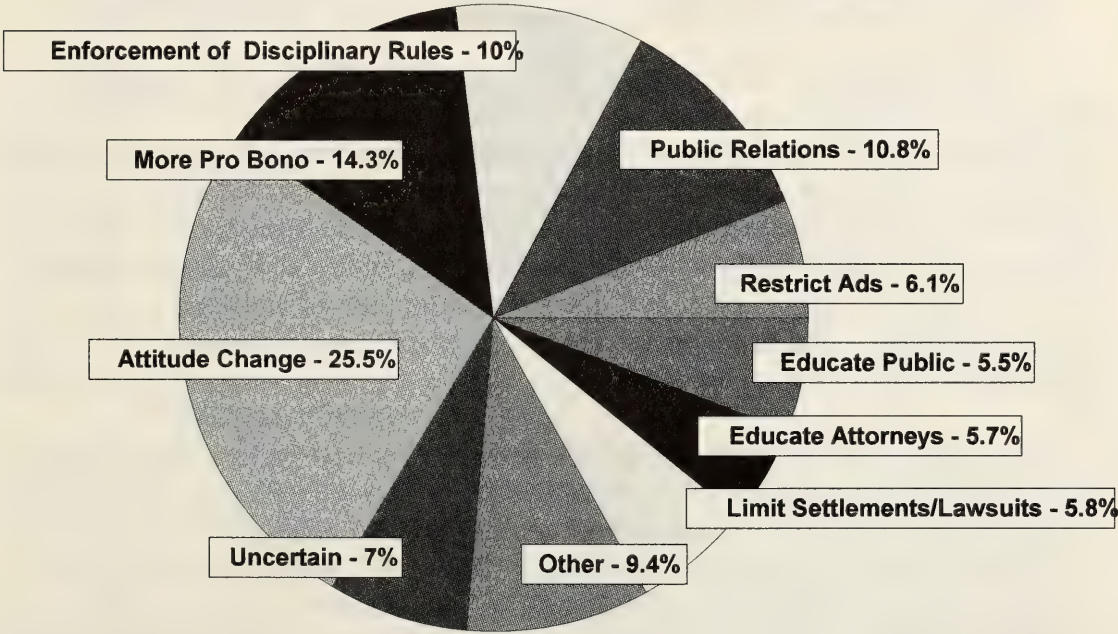
30. Lynn Liberato, *The Image of the Legal Profession*, 5 TEX. PARALEGAL J. No. 3 (1999). Liberato was the president-elect of the State Bar of Texas at the time Liberato submitted this article for publication.

their coffee could cause injury.”³¹

Regardless of whether the McDonald’s coffee case is viewed as frivolous or fitting, the fact remains that some litigation is frivolous. If litigation were not sometimes frivolous, there would be no need for Rule 11 sanctions. As a result, the public somewhat understandably views the legal system with a suspicious eye. As former Indiana State Bar Association President Sherrill William Colvin put it, “[t]he stereotypical image of manipulative lawyers and rapacious clients bringing frivolous lawsuits is almost as much of American lore as George Washington chopping down the cherry tree.”³²

While perhaps nothing can be done to erase or clarify the images of the McDonald’s coffee case in the public’s mind, survey respondents suggested various ways to improve the image of lawyers, including: increase disciplinary actions; initiate a public relations campaign; instill more honesty in the profession; curtail inflammatory television advertising; highlight pro bono work; change/improve the legal education process; and more aggressive screening on character and fitness. The chart that follows illustrates these responses.

Suggestions to Improve Image of Lawyers



Some of the more interesting survey responses included the following:
“Get the message out . . . it is a few lawyers who are making life

31. Baker, Final Report, *supra* note 6.

32. Sherrill William Colvin, *Civil Justice System Under Attack*, 47 RES GESTAE 5 (Dec. 2003).

miserable for the rest of us.”

“Quit being so money hungry and start caring about the client.”

“Lawyers should remember that they are working for the client, not the other way around.”

“The profession has to become more specialized so that the public knows the expertise of the lawyer.”

“Make pro bono service mandatory at X# hours/year. This would get more lawyers helping more people for free, which is a good thing from a PR point of view.”

“Put restrictions on advertising.”

“Stricter admissions and disciplinary policies.”

“Limit the number of law school admits. With so many law school graduates, lawyers will take any kind of case and do anything to win.”

As the foregoing reflects, the IBA survey produced an abundance of suggestions to improve the image of lawyers and the legal profession. Separately, numerous other initiatives have been taken to improve professionalism and civility and, in the process, the public's perception of lawyers and the legal profession. For example, the Indiana Supreme Court amended the Rules of Professional Conduct effective January 1, 2005. New language in paragraph [1] of the Indiana Preamble provides in part, “[w]hether or not engaging in the practice of law, lawyers should conduct themselves honorably.”³³ This amendment emphasizes lawyers' duty to conduct themselves honorably at all times.

In October 2004, the American College of Trial Lawyers distributed to every sitting federal judge a copy of its “Code of Pretrial Conduct and Code of Trial Conduct.” As Chief Justice William H. Rehnquist explained in his introduction to the code, the American College of Trial Lawyers first adopted its Code of Trial Conduct in 1956, and introduced the new pretrial code as “part of a continuing effort to promote professionalism and courtesy among trial lawyers during all stages of litigation.”³⁴ In addition, on August 24, 2004 the IBA presented a day-long seminar for law students entitled “Surviving & Thriving as a New Lawyer,” stressing professionalism, mentoring, and the like to law students. This program, which is under consideration to be repeated annually, is just one of a number of IBA professionalism initiatives that followed the

33. IND. PROF. COND. R., pmb., para. 1.

34. William H. Rehnquist, *Introduction*, in AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT AND CODE OF TRIAL CONDUCT (2002).

creation in 2003 of the position of IBA Professionalism Coordinator.

Yet well before this, bar associations throughout the state and the country were taking steps to promote professionalism and thereby improve the image of lawyers and the legal profession. Thus, in 2002, the IBA reaffirmed its “Tenets of Professional Courtesy,”³⁵ first adopted in 1989. These tenets are designed to promote professional courtesy and improve professional relationships among bar members. In June 1992, the Committee On Civility of the Seventh Federal Judicial Circuit issued its Final Report, which among other things included proposed standards for lawyers’ duties to other counsel and lawyers’ duties to the court.³⁶ Despite several long-running efforts to improve the image of lawyers and the legal profession, the survey results suggest that there remains much work to be done and that there is considerable room for improvement.

CONCLUSION

As the former president of the American College of Trial Lawyers recently wrote:

To me, the case for civility is overwhelming. I am unable to understand why one would abandon civility in favor of boorish, bullying, obnoxious, unfair behavior that is harmful to his reputation and in most instances, to the interests of his client. Not only does civility cost nothing, but it also holds the promise of sparking benefits.³⁷

Indeed, the case for professionalism and civility is overwhelming. It promises a return to the days referenced by Justice O’Connor when “society sincerely trusted and respected its lawyers.”³⁸ It promises a return to a time when, as Magistrate Judge Shields recalled, law was practiced with civility and grace.³⁹

35. These tenets provide as follows:

[1] In all professional activity, a lawyer should maintain a cordial and respectful demeanor and should be guided by a fundamental sense of integrity and fair play. [2] A lawyer should never knowingly deceive another lawyer or the court. [3] A lawyer should honor promises or commitments to other lawyers and to the court, and should always act pursuant to the maxim, “My word is my bond.” [4] A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement. [5] A lawyer should make all reasonable efforts to reach informal agreement on preliminary and procedural matters. [6] A lawyer should not abuse the judicial process by pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay. [7] A lawyer should always be punctual in communications with others and in honoring scheduled appearances.

36. In addition, Indiana recently joined other states in requiring all lawyers within their first three years of practice to complete an “Applied Professionalism” course.

37. Gene W. Lafitte, *Civility Costs Nothing*, THE BENCHER, at 21, July/Aug. 2004.

38. O’CONNOR, *supra* note 1, at 226.

39. Paul Harris Stores v. Pricewaterhouse Coopers LLP, No. 02-CV-1014-LJM/VSS, slip op. at 1 (S.D. Ind. Jan. 31, 2005).

The IBA survey reveals that negative impressions of lawyers are widespread, that these impressions are more often than not based on people's own experience with lawyers, and that there is a perception that others overwhelmingly share these negative views. These survey results should cause those who care about this honorable profession to take action. The survey itself suggests several steps that warrant further study. There will be no magic bullet. It is likely, however, that any improvement in these negative views will depend upon a sustained, multi-faceted approach aimed at improving the quality of legal representation, promoting the countless good deeds that lawyers do, and correcting any public misunderstanding of the nature of the legal practice.

LET THE SELLER BEWARE: THE SLOW DEMISE OF CAVEAT EMPTOR IN REAL PROPERTY TRANSACTIONS AND OTHER RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW*

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This Article takes a topical approach to the notable real property cases in this survey period, October 1, 2003 through September 30, 2004, beginning with an in-depth analysis of the disclosure requirements imposed upon transactions involving the sale and purchase of residential real estate in the State of Indiana. The Article then discusses some of the noteworthy reported opinions concerning Indiana law issued during the survey period in each of the following areas: (1) developments in the common law of property; (2) relationships between private parties; (3) title and recording issues; (4) land use law; and (5) eminent domain law.

I. RESIDENTIAL REAL ESTATE SALES DISCLOSURES

The State of Indiana now requires the seller of residential real estate to provide a Residential Real Estate Sales Disclosure Form (a “Disclosure Form”) to the buyer of the property stating any defects in the home of which the seller is aware. As this is a fairly new requirement and is contrary to the formerly established rule of caveat emptor in real estate transactions in the State of Indiana, cases will undoubtedly arise testing the parameters of this new regimen. One such case has arisen during this survey period.

In *Verrall v. Machura*,¹ the Indiana Court of Appeals was presented with an opportunity to consider the effect of the completion by a seller of residential real property of the Disclosure Form² now required of most such sellers throughout the State of Indiana. The facts of this case are not atypical. Our story begins with the Verralls, our sellers, buying a home in Crown Point, Indiana, in 1997. Shortly after the purchase, the Verralls discovered that the basement suffered a good deal of water seepage. The couple from whom the Verralls purchased the home had dutifully, or so one imagines, disclosed in their Disclosure Form that one corner of the basement leaked a bit during heavy rains. Apparently sensing themselves abused, the Verralls initiated litigation that was eventually settled.³

* The views and opinions expressed are solely those of the authors and not necessarily those of their respective employers.

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1. 810 N.E.2d 1159 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004).

2. *See infra* notes 18-36 and accompanying text.

3. 810 N.E.2d at 1160.

The Verralls lived in the home for several more years, during which time their neighbors rerouted the discharge line of a sump pump. The Verralls noticed that the basement deluge subsided and that no repairs were necessary. They then remodeled the basement. In 2002, the Verralls decided to sell the home and, like most homeowners, contacted a real estate agent to list the property.⁴

Mr. Machura noticed the listing, toured the property a few times and decided to submit an offer. The Verralls signed and delivered a Disclosure Form in which the Verralls affirmatively responded to the Form's question "[a]re there moisture and/or water problems in the basement or crawl space area."⁵ They also added the following statement: "During heavy rainfall, possible light seepage in SE/SW corner of basement."⁶ Mr. Machura made further inquiry regarding this issue and the Verralls provided some waterproofing quotes. The Verralls did not, however, discuss with Mr. Machura the previous water damage that they had suffered or the litigation with the prior owners.

Apparently satisfied, Mr. Machura elected not to have the home inspected and proceeded to closing. As fate would have it, less than two months after buying the home, the basement flooded on two separate occasions. In the course of making repairs, a pegboard wall was removed which revealed a crack in the basement wall. Mr. Machura then demanded of the Verralls reimbursement for the repairs to the wall, as well as other items not relevant to our inquiry, which demand was, naturally, refused.⁷

Litigation ensued and the Verralls moved for summary judgment on the argument that the Buyer could not state a cause of action for fraud on the basis of the Verralls' statements made in the Disclosure Form. The trial court disagreed and denied summary judgment. An interlocutory appeal was then taken and the court of appeals affirmed the denial.⁸

Until recently, *caveat emptor*⁹ had always been the rule of law in the State of Indiana in the buying and selling of real estate. A seller of real property was generally not required to disclose any facts regarding the condition of property he or she was selling unless there existed some relationship between the seller and buyer for which the law imputed some duty of disclosure.¹⁰ However, once a buyer made an inquiry regarding the condition, characteristics, or qualities of the property, the law provided that such a relationship was created and the seller was then under a duty to disclose any and all problems associated with the

4. *Id.*

5. *Id.* at 1161.

6. *Id.*

7. *Id.*

8. *Id.* at 1162.

9. *Caveat emptor, qui ignorare non debuit quod jus alienum emit.*—Let a purchaser, who ought not to be ignorant of the amount and nature of the interest he is about to buy, exercise proper caution. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS: CLASSIFIED AND ILLUSTRATED 769 (8th ed. 1882).

10. See, e.g., *Choung v. Iemma*, 708 N.E.2d 7 (Ind. Ct. App. 1999); *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370 (Ind. Ct. App. 1998).

subject of the buyer's inquiry.¹¹ The statements then made or omitted by the seller can create the basis for a fraud action against the seller. In Indiana, "[t]o constitute a valid claim for fraud the party must prove there was a material misrepresentation of past or existing facts made with knowledge or reckless ignorance of its falsity, and the misrepresentation caused reliance to the detriment of the person relying upon it."¹²

In the name of consumer protection, inroads have been made into the effect of the rule of caveat emptor with respect to purchase of new homes from a merchant builder of the home by implying a warranty of merchantability.¹³ Indeed, the rule of caveat emptor seems misplaced in relation to a transaction involving the acquisition of a new home from one in the business of building new homes. However, the rule does not seem to be misplaced in connection with the transfer of an older home from one homeowner to the next. The selling homeowner is not in the business of building or developing homes and generally would lack any special ability to discern problems with the home. Nevertheless, some jurisdictions began to make further consumer-protectionist inroads into the rule in these transactions by requiring sellers to disclose to buyers any material latent defects of which the seller had knowledge.¹⁴ This was an inroad that the courts of Indiana had never made.

Nevertheless, litigation in other jurisdictions finding sellers liable for failure to disclose material latent defects increasingly included the seller's listing brokers in the action on the theory that as the seller's agent, they had independent duties of disclosure as well. Of course, pointing out defects rarely levels the road from contract signing to closing, so brokers, as well as sellers, are reluctant to make the disclosures. However, as the specter of judgments against brokers become more real, brokers devised a strategy to combat this potential liability. Brokers initially required their clients to disclose to them in writing all known defects in the property. If the seller did not disclose it to the broker, then the broker could resist liability on the theory that the seller breached its disclosure obligation to the broker. Sellers, on the other hand, often resisted this voluntary disclosure out of a reluctance to admit any defects.¹⁵

Although this tactic proved to be somewhat helpful, brokers would still be involved in litigation and the disclosures merely gave them a defense. In addition, there was still the question of what needed to be disclosed to buyers. Brokers also worried about meticulously honest sellers losing transactions to sellers who were much less forthcoming. The solution to their problems lay with

11. *Choung*, 708 N.E.2d at 14 (citing *Thompson v. Best*, 478 N.E.2d 79, 84 (Ind. Ct. App. 1985); *Ind. Bank & Trust Co. of Martinsville v. Perry*, 467 N.E.2d 428, 431 (Ind. Ct. App. 1984)).

12. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998) (citing *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1058 (Ind. 1992)).

13. *Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972).

14. George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 REAL PROP. PROB. & TR. J. 193, 198-99 (2004).

15. *Id.* at 213-18.

the legislature. If the state would require disclosure to buyers of real property of everything by every seller, then the brokers would not seem to be the source of the problem in the eyes of the sellers and the brokers would be removed from any disputes. In addition, brokers could be even more removed from any disputes if the legislature could specifically state that brokers are not responsible for any disclosure actually made or any failure to make a disclosure regarding any condition of the property.

Accordingly, the National Association of Realtors has been very active in lobbying efforts to pass seller-mandated disclosure laws for single-family residential real estate throughout the country.¹⁶ They have been successful in about two-thirds of the states.¹⁷ Indiana joined those ranks in the mid 1990s with the passage of its law.¹⁸ The law requires nearly all sellers¹⁹ of residential real estate²⁰ to complete, sign, and deliver to any buyer of that property a Disclosure Form as promulgated by the Indiana Real Estate Commission.²¹ The form contains a lengthy list of common²² components of single family homes and requests the seller to check a box indicating that the home does not contain such feature, that it is defective, that it is not defective, or that the seller does not know about the condition of the feature. The form also has a series of questions for the seller to answer regarding whether there are any problems with various features or systems of the property.

The statute further requires that several notices be placed on the form. Of particular interest is one that states: "The representations in this form are the representations of the owner and are not the representations of the agent, if any. This information is for disclosure only and is not intended to be a part of any contract between the buyer and the owner."²³

We learn several things from this notice. First, this notice seemingly makes clear that the responses made by the seller in the Disclosure Form are representations of the seller—albeit for "disclosure" purposes only. One could

16. *Id.* at 213.

17. *Id.* at 199.

18. IND. CODE §§ 32-21-5 to -13 (2004).

19. The following transfers are exempt from the disclosure requirements under IND. CODE § 32-21-5-1(b): (a) transfers by order of court; (b) transfers by a mortgagee following foreclosure or a deed in lieu of foreclosure; (c) transfers by a fiduciary in the administration of a trust or estate; (d) transfers among co-owners; (e) transfers made to spouses or decedents; (f) transfers made due to the owner's failure to pay taxes; (g) transfers involving any governmental entity as a buyer or seller; (h) transfers of the first sale of a dwelling that has not been occupied; and (i) transfers to a living trust.

20. Residential real estate for this purpose excludes any property that contains more than four (4) dwelling units. *Id.* § 32-21-5-1(a).

21. *Id.* at § 32-21-5-7. A copy of the form currently issued by the Indiana Real Estate Commission is available at <http://www.in.gov/icpr/webfile/formsdiv/46234.pdf>.

22. More uncommon features are also included in the list, such as saunas and built-in vacuum systems.

23. IND. CODE § 32-21-5-7(3).

glean from the foregoing that there are different types of representations, one that is for disclosure purposes, and perhaps one for general or some other purposes. Second, the notice also seemingly makes clear that whatever the representations are, they are not intended to be a part of the contract between the two parties. However, the statute further provides that “an accepted offer is not enforceable against the buyer until the owner and the prospective buyer have signed the disclosure form.”²⁴ Therefore, while the intent is that the Disclosure Form not be a part of the contract, it clearly affects the rights of the parties to the contract in very significant ways.²⁵

In addition, the statute provides that the “disclosure form is not a warranty by the owner”²⁶ and that it “may not be used as a substitute for any inspections or warranties that the prospective buyer or owner may later obtain.”²⁷ The Disclosure Form repeats this language as well. The typical party to a residential real estate transaction, and probably most attorneys too, will likely not appreciate the difference between a “representation” and a “warranty.” The distinction between the two is not often the subject of any litigation as represented by the lack of any recent case law discussing the difference. However, the Indiana courts have addressed the issue and have drawn a clear distinction between the two. A warranty is a statement of fact made or implied by one party to a contract to the other party which, although “collateral to the principle purposes of the contract,”²⁸ is an element of the contract and part of the consideration for the transaction.²⁹ A representation, then, is a statement of fact that does not rise to the level of a warranty and an action for recovery for misrepresentations lies in tort, i.e., fraud.³⁰ The principal difference between the two is that to recover for a breach of representation one needs to prove fraud and show that the misrepresentation was material, the seller knew or was recklessly ignorant of the falsity of the statement, and that the buyer relied on the misstatement;³¹ whereas for a breach of warranty, one merely needs to show that the statement was made or implied and that it was false.³²

Therefore, it is apparent that the intent and result of the residential real estate disclosure statute was to abolish the rule of caveat emptor in transactions for the transfer of residential real estate by requiring full and complete disclosure from the sellers of residential real estate and making such sellers, and not their agents, liable to their buyers for the failure to disclose information regarding the

24. *Id.* § 32-21-5-10(c).

25. It is interesting to note that the buyer has to sign the disclosure form to be liable prior to closing under the contract—an act clearly outside of the contract yet having, under the statute, the ultimate effect on the buyer’s obligations under the contract. *Id.* § 32-21-5-10(a).

26. *Id.* § 32-21-5-9.

27. *Id.*

28. *McCarty v. Williams*, 108 N.E. 370, 372 (Ind. App. 1915).

29. *Id.*

30. *Id.* (quoting *Rose v. Hurley*, 39 Ind. 77 (1872)).

31. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998).

32. See, e.g., *McCarty*, 108 N.E. 372.

condition of the home. The statute does provide, however, a safe-harbor from this seller liability by specifically exempting a seller from liability for any error or omission if:

(1) the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided by a public agency or by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct; and

(2) the owner was not negligent in obtaining information from a third party and transmitting the information.³³

Accordingly, in an action against the seller for fraud based on an error or omission in the Disclosure Form, the seller has two possible defenses:³⁴ (1) that the seller did not actually know of the defect alleged,³⁵ or (2) that the seller had a repair or inspection of a particular item done by a qualified person on which the seller can reasonably rely.

Prior to *Verrall v. Machura*, the case from our survey period, there had been only one reported decision construing the disclosure statute, *Kashman v. Haas*.³⁶ The dispute in *Kashman* involved a claim by the buyer of a home that the home contained extensive termite damage which the sellers failed to disclose, although the sellers did provide a Disclosure Form as required by law. The evidence in that case showed that the sellers had on three separate occasions during the seven years prior to the time the sellers sold the property discovered termite damage and contacted a professional to treat the house and repair any damage. The last such occasion happened in the year prior to the sale. At that time the sellers received a report from the professional that all known termite damage had been repaired and that there was no evidence of present infestation.³⁷

The buyer also had the home inspected for termite infestation and damage prior to the sale and received a clean report, just as the sellers had one year

33. IND. CODE § 32-21-5-11 (2004). An anomaly presented by this wording is that for the seller to escape liability under this section on the basis that the seller has no actual knowledge, the seller will first have to prove a negative (rarely an easy task), i.e., that seller actually did not know, *and* that the seller did not negligently obtain or transmit information to the buyer. It is difficult to understand how those two factors are related.

34. These would be in addition to any defenses based upon the lack of the buyer to prove each element of the fraud case, i.e., that the misrepresentation or omission was material and that the buyer could reasonably rely on the statement or omission.

35. This provision makes the seller's defense in the fraud action a bit easier because under a general fraud action the fraudfeasor needs to have either actual knowledge or be reckless in the falsity of the statements made. *See Fimbel*, 695 N.E.2d at 127. Under the statute, the seller can try to show that he or she did not actually know. The buyer will still have to show either actual knowledge or recklessness.

36. 766 N.E.2d 417 (Ind. Ct. App. 2002).

37. *Id.* at 422.

previously. The sellers even gave the buyer a copy of the termite protection plan sellers had previously received from the professional who examined the home.³⁸ Despite all this investigation, repair, and confirmation, the buyer discovered termite damage to the home some time after closing and brought suit against the seller claiming breach of contract and fraud. The trial court granted sellers summary judgment and the buyer appealed. The buyer's fraud claim was based on the Disclosure Form completed and delivered by the sellers. The court of appeals focused on two factors in affirming the grant of summary judgment.³⁹ First, the court of appeals considered the level of knowledge, or the absence of knowledge, that sellers seemed to have regarding the alleged defect.⁴⁰ The court discussed the disclosure statute's provision that a seller is not liable for errors in the form if the seller either has no actual knowledge of the defect or that the seller reasonably relied on a statement from a professional.⁴¹ The court found that there was no evidence that sellers actually knew of any termite damage and that sellers had relied on a report from the termite professional.⁴² The court noted that the buyer had failed to produce any evidence that the seller had any actual knowledge regarding the defect; therefore, the buyer did not do so, the buyer's claim must fail under the statute.⁴³

The second factor considered by the court was the manner of buyer's investigation of the condition of the home.⁴⁴ The court pointed out, as described above, that the statute itself cautions that the Disclosure Form is not a warranty and cannot be used as a substitute for an inspection of the home.⁴⁵ The court also noted a "well settled" rule of law that "[a] purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities."⁴⁶ Because the buyer in this case did have the opportunity to inspect the home, and actually had it inspected, the sellers were entitled to summary judgment.

This second factor considered by the court of appeals in *Kashman* would seem to create the most significant obstacle for a disgruntled buyer in a residential real estate transaction in pursuing a fraud claim against his or her seller based on representations made in the required Disclosure Form. As stated above, one of the elements for a fraud action is that the victim of the fraud show that the misrepresentation was relied on to the detriment of the victim.⁴⁷ Under

38. *Id.* at 419.

39. *Id.* at 422.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* See also *supra* notes 26-32 and accompanying text.

46. *Kashman*, 766 N.E.2d at 422 (quoting *Pennycuff v. Fetter*, 409 N.E.2d 1179, 1180 (Ind. Ct. App. 1980)) (alteration in original).

47. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998).

Kashman's second factor, that reliance cannot be present where the representation is one made in the Disclosure Form—the statute clearly provides that it is no substitute for an inspection by the buyer.

We turn our attention back to the dispute between the Verralls and Mr. Machura. The trial court denied the Verralls' motion for summary judgment on the ground that "the Disclosure Form is not a warranty and cannot be the basis for a fraud claim."⁴⁸ The Verralls understandably rely heavily on *Kashman* as it is the only guiding precedent on the construction of the statute. Indeed, in light of the second factor discussed in *Kashman*, the conclusion arrived at by the Verralls seems obvious. Unfortunately, the court of appeals did not consider the second factor discussed in *Kashman*. Instead, the court focused on the evidence that was submitted at the summary judgment hearing regarding the knowledge that the Verralls had concerning the leaking basement and the root cause of the problem. The court held that the denial of summary judgment was proper because there was a material question of fact regarding the level of the Verralls' knowledge.⁴⁹

The conduct of the buyer, Mr. Machura, in the *Verrall* case would seem to be provide even more reason to consider whether an allegedly aggrieved party can rely on the representations made in a Disclosure Form. In that case, the Verralls disclosed that there was some seepage in the basement. Instead of inspecting the home and investigating the matter further, Mr. Machura elected to buy the property without any inspection at all.⁵⁰ The precedent established in *Kashman* seems to militate directly against finding any fraud in this situation as the buyer cannot waive the right to inspect the home and then pursue a fraud claim based on a misrepresentation in the Disclosure Form.

By ignoring the buyer's conduct in failing to conduct his own inspection, especially in light of the disclosure that was made to him by the sellers, by ignoring the plain provisions of the disclosure statute, and by ignoring the well settled rule of law expounded by the *Kashman* court, the court of appeals has made that which seemed clear to now be debatable. However, the issue of the extent to which a party may rely on these statutorily required Disclosure Forms should not lie with the courts, but with the legislature.

Because our legislature has sought to undo the effect of caveat emptor in the purchase of older homes from one homeowner to another, it should do so only in a clear and understandable manner. By stating clearly that the Disclosure Form is not to serve as a substitute for an inspection, the *Kashman* court is correct in refusing to hold a seller responsible in fraud for an error in the Disclosure Form. But if that is the case, what good is the Disclosure Form? It is clearly and specifically made not a part of the contract between the buyer and seller and it is not the basis of a warranty from seller to buyer. It serves at most as a representation of certain facts, limited to the actual knowledge of the seller. As such, the only seemingly possible action that may lie for a misrepresentation

48. *Verrall v. Machura*, 810 N.E.2d 1159, 1163 (Ind. Ct. App. 2004).

49. *Id.* at 1164.

50. *Id.* at 1161.

made in the Disclosure Form is a fraud action. But if *Kashman* is correct and the seller cannot be held accountable for his or her misrepresentations in the Disclosure Form, then of what use is the Disclosure Form?

II. COMMON LAW

In two cases during the survey period, the court of appeals addressed common law issues relating to the creation of easements. Both cases demonstrated that the common law often follows common sense. In the first case, the court emphasized that easements may only be created in the absence of a written document by stringent application of the common law requirements. In the second, the court allowed for equitable reformation to correct a mutual mistake of fact in the document that had created the easement.

In *Wolfe v. Gregory*,⁵¹ the court of appeals reviewed whether a trial court decision refusing to find that an access easement had been created by prescription or necessity was contrary to the law. In 1977, a seventy-acre tract was divided between five siblings into five parcels of land. County roads ran along the northern and southern boundaries of the larger tract, but access to some of the interior parcels was provided by an “old farm road” which connected to the county road on the south. A few months after the division took place, Margie Cornett built a road which connected her parcel to the county road on the north. Her brother, Marvin Lagle asked for and received permission to use Cornett’s road to reach his parcel. In 2000, Lagle sold his parcel to his niece, Brooke Gregory, who in turn divided it in two and conveyed five acres to her brother, Dustin Wolfe. Cornett denied Wolfe use of her road. Shortly thereafter, Wolfe filed a complaint seeking to establish that he had the right to use Cornett’s road via a prescriptive easement or, in the alternative, an easement by necessity. The trial court entered judgment against Wolfe and he appealed. The court of appeals upheld the decision of the trial court, noting that, in the absence of a written document, easements by prescription or necessity are only created at common law if the requirements are strictly adhered to.⁵²

The court reiterated the common law rule that to establish the existence of a prescriptive easement, the evidence must show an actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty years under a claim of right.⁵³ Although one may “tack on” a previous owner’s period of adverse use to reach the twenty year period, the court noted that Lagle’s use of the road was not adverse or hostile, but expressly permitted by Cornett. Because Wolfe failed to meet the required time period of adverse use, the court did not examine whether any of the other elements of the test were satisfied.⁵⁴

The court then turned to Wolfe’s claim that he had the right to use Cornett’s road under an easement of necessity. The court reiterated the common law rule

51. 800 N.E.2d 237 (Ind. Ct. App. 2003).

52. *Id.* at 240-42.

53. *Id.* at 240.

54. *Id.*

that “an easement of necessity will be implied when ‘there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road.’ An easement of necessity may arise, if ever, only at the time that the parcel is divided and only because of inaccessibility then existing.”⁵⁵ On the facts of this case, the court found that evidence existed that the “old farm road” was in current use by several owners, including Wolfe. Although the court noted that Wolfe’s access to his parcel would be more convenient if he was able to use Cornett’s road, “Wolfe’s convenience is not relevant in determining whether to imply an easement of necessity.”⁵⁶

In *S&S Enterprises v. Marathon Ashland Petroleum, LLC*,⁵⁷ Ramada Inns, the owner of a parcel of land near the Indianapolis airport, carved out a smaller parcel and sold it to Marathon Oil Company for the construction of a gas station. After the conveyance, Ramada gave Marathon a written easement, which provided that Marathon would have a non-exclusive twenty-five foot easement on the West property line of the Marathon parcel so that the two owners could share a common access drive. Ramada then amended the easement with a rider, which had identical language, except that it substituted the word “East” instead of “West.” Along the eastern property line of the Marathon parcel is a steep drainage ditch with a nineteen foot drop. Along the western property line of the Marathon parcel, a driveway with curb cuts into both the service station and the hotel was built and used by both owners from 1972 until 1984. Subsequently, Ramada management erected large concrete barricades to close off access to the hotel parking lot, but to not the gas station, from the driveway. The Ramada parcel was sold to S&S in 1986. The next year, the Ramada Inn was destroyed by a United States Air Force jet. In 1999, the Marathon was damaged by fire and had to be rebuilt. During the rebuilding process, Marathon’s counsel sent a letter to S&S asking it to remove the concrete barriers so that it would have complete access to its easement area. S&S gave permission for Marathon to move the barriers and a few months later filed an action for trespass and injunctive relief. The trial court granted summary judgment to Marathon. S&S appealed.

The trial court granted Marathon summary judgment on the theory that the designated evidence showed that a mutual mistake occurred when Ramada executed the rider and that the easement, not the rider, correctly provides the location of the access easement.⁵⁸ Because of the mutual mistake, the trial court granted Marathon relief under the doctrine of reformation, which the court of appeals characterized as “an extreme equitable remedy.”⁵⁹ Because S&S and Marathon both agreed that the remedy of reformation should not be available if S&S were a bona fide purchaser, the court of appeals approached that issue first.

To qualify as a bona fide purchaser, the court reminded us, one has to purchase in good faith, for a valuable consideration, and without notice of the

55. *Id.* at 241 (quoting *Cockrell v. Hawkins*, 764 N.E.2d 289, 292 (Ind. Ct. App. 2002)).

56. *Id.*

57. 799 N.E.2d 18 (Ind. Ct. App. 2003).

58. *Id.* at 22.

59. *Id.*

outstanding rights of others.⁶⁰ Since both the easement and the rider were recorded, the issue discussed by the court was whether S&S had any notice that the legal description in the rider was inaccurate. It concluded that the designated evidence, including the location of the steep drainage ditch along the eastern edge of the Marathon parcel, established that S&S had inquiry notice of the disconnect between the language of the rider and the reality of the site.⁶¹ The standard under Indiana common law, is whether the facts are such as to put a “reasonably prudent person upon inquiry.”⁶²

The court then turned to the question of whether the trial court erred when it granted summary judgment to Marathon and reformed the language in the rider. The court discussed the designated evidence that likely led to the mistake, particularly a statement by the surveyor that the survey was not prepared to show North as “up,” but rather that the survey was oriented toward the public road serving the site.⁶³ In addition, the court focused on a statement by the representative of Ramada who had executed the easement and rider in which he stated that “[Ramada] would not have intentionally conveyed an easement to Marathon that was not [useable].”⁶⁴ Based upon the designated evidence, the court of appeals found that the trial court did not err when it granted summary judgment to Marathon on the theory of mutual mistake.⁶⁵

The most interesting issue in *S&S Enterprises* is the one that was not discussed by the court of appeals, namely, whether the trial court had the discretion to grant an equitable remedy without considering whether or not Marathon had an adequate remedy at law. The court did not mention any of the cases in the previous survey period that debated this issue and were discussed at length in last year’s article.⁶⁶ Although the court cited *Estate of Reasor v. Putnam County*⁶⁷ for the proposition that the doctrine of reformation is an “extreme” equitable remedy, it did not mention the more recent case by the Indiana Supreme Court that stated that if an adequate remedy at law exists, equitable relief should not be granted.⁶⁸ *S&S Enterprises* is therefore most notable because it continues to highlight that the “well-settled rules of equity” rest on shaky foundations.⁶⁹

60. *Id.*

61. *Id.* at 23-24.

62. *Id.* at 25.

63. *Id.* at 26-28.

64. *Id.* at 28.

65. *Id.*

66. See Tanya Marsh, “We Just Saw It from a Different Point of View”: Recent Developments in Indiana Real Property Law, 37 IND. L. REV. 1307, 1309-14 (2004).

67. 635 N.E.2d 153 (Ind. 1994).

68. Ind. Family & Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 162 (Ind. 2002).

69. See *Kesler v. Marshall*, 792 N.E.2d 893, 896 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 795 (Ind. 2004) (The discretion to award equitable remedies “is not arbitrary, but is governed by and must conform to the well-settled rules of equity.”).

III. RELATIONSHIPS BETWEEN PRIVATE PARTIES

A. Buyer and Seller

Disputes between purchasers and sellers of real estate often arise over the description of the property in a purchase agreement or the understanding of the parties regarding that description or the property to be acquired and sold. This survey period brings another such case in *Perfect v. McAndrew*.⁷⁰ The Perfects owned land in Dearborn County, Indiana, which they thought, based on their deed for the property, contained 81.1 acres. Mr. McAndrew made the Perfects an offer to purchase the property, which was described as "Anderson Rd, 81.1 acres owned by Perfects,"⁷¹ for \$250,000. The Perfects countered that offer for a purchase price of \$252,500.⁷² Mr. McAndrew then viewed the property with the Perfects during which the parties inspected the boundaries and the Perfects described the location of the boundaries and the extent of the property. The parties never discussed the acreage of the property and McAndrew then accepted the Perfects' counteroffer.⁷³

Mr. McAndrew obtained a survey of the property during the course of his due diligence. The survey revealed that the property consisted of over ninety-two acres instead of the eighty-one acres which the Perfects thought they owned. After noting that fact, the Perfects decided to try to renegotiate the purchase agreement. When those attempts proved fruitless, the Perfects sought to terminate the purchase agreement through a claim that Mr. McAndrew had not timely provided notice of the receipt of a commitment to obtain his financing.⁷⁴ The Perfects then simply refused to close and Mr. McAndrew filed suit for specific performance.

The trial court entertained a bench trial of the action and entered judgment for specific performance in Mr. McAndrew's favor finding that there was a meeting of the minds of both parties regarding the land to be purchased under the contract and that an "in gross" sale of land was contemplated.⁷⁵ The Perfects appealed arguing that the trial court's determination that the sale was in gross was erroneous. The court of appeals disagreed and affirmed the judgment of the trial court.⁷⁶

The first issue to be discussed in this case concerned whether the agreement called for the property to be sold in gross, where the property is "sold in a lump, and for a gross sum,"⁷⁷ or on a per acre basis. The court held that the agreement set forth an in gross calculation and that the parties clearly understood what

70. 798 N.E.2d 470 (Ind. Ct. App. 2003).

71. *Id.* at 472.

72. *Id.*

73. *Id.* at 473.

74. *Id.*

75. *Id.* at 474-75.

76. *Id.* at 480.

77. *Id.* at 476.

property was to be conveyed and that the number of acres was not a consideration.⁷⁸ The seller's misunderstanding of the actual number of acres was not relevant. The seller in this case argued that the lack of the phrase "more or less" in relation to the description of the acreage of the property in the agreement took the agreement out of the "in gross" category and put it on a per acre basis. The court of appeals, relying on an 1890 Indiana Supreme Court case,⁷⁹ found that while that phrase may be helpful in determining the nature of the agreement in question, the presence or absence of the expression is not conclusive.⁸⁰

After finding that the agreement was on "in gross" basis, the court of appeals also addressed the issue of mutual mistake which was raised by the seller in this case. If there was a true mutual mistake of an essential fact, then the agreement would be avoidable by either party.⁸¹ However, the evidence presented was clear that there was no mistake on either party's part about what land was to be sold under the agreement, only about what the acreage was. Because the court had already determined that the agreement was on in gross, this fact was not "one that is 'of the essence of the agreement'"⁸² and that the parties were mistaken of it was not controlling. Therefore, the trial court's granting of judgment to Mr. McAndrew for specific performance was affirmed.⁸³

Another interesting case regarding the relationship between buyer and seller which arose during the survey period involved the construction of provisions in a contract in which the seller retained a "right of residency" in a farm house on the property sold. In *Krieg v. Hieber*,⁸⁴ Krieg conveyed his farm to Heiber under a warranty deed which provided that the conveyance was "[s]ubject to right of residency of the Grantor in the house, garage, apartment and land thereto, including use of the driveway."⁸⁵ About a month after the transfer of the property subject to this right, the seller cancelled his insurance policy covering the property and the buyer acquired an insurance policy. A year later the house burned down and became uninhabitable. The buyer made a claim against his insurance policy for the loss and then elected to use the proceeds to reduce his mortgage on the property rather than rebuild the house.⁸⁶

The seller objected to this expenditure of the insurance proceeds and initially sought to impose a constructive trust on the proceeds. At the trial, the seller changed his requested relief to recover damages for the lost value of his retained

78. *Id.* at 478.

79. *Hayes v. Hayes*, 25 N.E. 600 (Ind. 1890).

80. 798 N.E.2d at 477-78.

81. *Id.* at 478.

82. *Id.* at 479 (citing *Bowling v. Poole*, 756 N.E.2d 983, 989 (Ind. Ct. App. 2001)).

83. Although this remedy is clearly one in equity, there is no indication that the court considered whether an adequate remedy at law existed. *See supra* notes 68-69 and accompanying text.

84. 802 N.E.2d 938 (Ind. Ct. App. 2004).

85. *Id.* at 941.

86. *Id.* at 942.

life estate.⁸⁷ Following a bench trial, the court entered judgment for the buyer and the seller appealed. The court of appeals agreed with the seller, reversed the trial court and remanded for further proceedings to determine the value of the life estate so retained.⁸⁸

For our purposes, the discussion of the court of appeals regarding the rights reserved by the seller in this transaction is instructive. First of all, the court of appeals disagreed with the trial court in holding that a life estate in the house, garage, apartment, land, and the use of the driveway was created by the deed.⁸⁹ The trial court refused to recognize that a life estate was created but that a right of residency was reserved which was apparently similar to a life estate. The court of appeals clarified that the actual words "life estate" were not required, but that the estate may be created by any "equivalent and appropriate language."⁹⁰ The court of appeals further found that in creating the life estate in this manner, the seller limited his rights to his own residency therein, i.e., he could not sell his life estate or allow others to live at the property in his absence.⁹¹

Having thus determined that a life estate was created, the court of appeals then turned to the question of the entitlement of the life tenant to insurance proceeds obtained by the remainderman. The court discussed a prior court of appeals case holding that a life tenant generally is entitled to the entire proceeds of insurance procured by the life tenant even if those proceeds are greater than the value of the life tenant's interest unless the instrument creating the life estate requires that such proceeds be shared or the parties make some agreement as to the sharing of any proceeds.⁹² Of course, the issue at hand is the opposite, i.e., whether the remainderman is entitled to the entire proceeds even if they exceed the value of the remainderman's interest. The court of appeals held that where the remainderman acquires insurance on property subject to a life estate, he "necessarily insured the property for the benefit of [the life tenant's] limited life estate."⁹³ The court of appeals further found that, notwithstanding such holding, there was some evidence that the parties had agreed that the remainderman had acquired insurance to protect both parties.

B. Liens

One of the more intriguing cases of the survey period involves a dispute over the priority of competing liens on a piece of property—a mortgage and a mechanic's lien. In *Provident Bank v. Tri-County Southside Asphalt, Inc.*,⁹⁴ the court of appeals considered the relative priority of a mortgage, recorded against

87. *Id.*

88. *Id.* at 947.

89. *Id.* at 945.

90. *Id.*

91. *Id.* at 945-46.

92. *Ellerbusch v. Meyers*, 683 N.E.2d 1352 (Ind. Ct. App. 1997).

93. 802 N.E.2d at 946.

94. 804 N.E.2d 161 (Ind. Ct. App. 2004).

the property in December 1999, and a mechanic's lien, for work commenced in June 2000. When the mechanic's lien holder failed to receive payment for an asphalt driveway it had constructed on the property, it filed an action to foreclose on the mechanic's lien. The trial court entered summary judgment to the mechanic's lien holder, finding that it had priority over all liens but tax liens.⁹⁵ The mortgage holder appealed and the court of appeals reversed the trial court.⁹⁶

In so doing, the court of appeals analyzed the effect of two sections of the Indiana Code. The first section plainly states that "[a] conveyance, mortgage, or lease takes priority according to the time of its filing."⁹⁷ Because the mortgage at issue in this case was recorded some seven months prior to the time the first work was performed giving rise to the mechanic's lien, the mortgage lien has priority under this section. The second section is in the mechanic's lien statute and provides that where property which is subject to a mechanic's lien is also encumbered by a mortgage, then the mechanic's lien "is not impaired by . . . foreclosure of mortgage. The buildings may be sold to satisfy the lien and may be removed not later than ninety (90) days after the sale by the purchaser."⁹⁸ As such, the mechanic's lien holder is protected by giving him priority in the improvement itself. Accordingly, the holder of the mechanic's lien "may sell the improvements to satisfy the lien and remove them within ninety days of the sale date."⁹⁹

One may question the extent of the used driveway market in central Indiana; however, after this decision, that market increased by one. The court of appeals acknowledged the mechanic's lien holder's assertion that the "practical ramifications" of removal and sale of the driveway and noted that although it is not the ideal solution, "[r]emoval, however, is not impossible and is the solution that effects the intent behind both"¹⁰⁰ of the above-referenced sections of the Indiana Code.

Judge Sharpnack filed a dissenting opinion in this case. His solution would have been to allow the mechanic's lien holder to foreclose its lien on the property subject to the rights of the mortgage holder and then to give the mechanic's lien holder priority "up to the amount of its interest with respect to the driveway."¹⁰¹ That may indeed be a more sensible approach than the majority opinion, but it clearly ignores the effect of the general priority statute that gives the first recorded lien priority. Allowing the mechanic's lien holder to have priority up to the amount of its interest is tantamount to giving that lien holder priority, which is clearly not envisioned by the statutes discussed in the majority opinion.

95. *Id.* at 163.

96. *Id.* at 166.

97. IND. CODE § 32-21-4-1(b) (2004).

98. *Id.* § 32-28-3-2.

99. 804 N.E.2d at 165.

100. *Id.* at 165.

101. *Id.* at 170 (Sharpnack, J., dissenting).

C. Restrictive Covenants

In *King v. Ebrens*,¹⁰² the court of appeals examined the language and circumstances necessary to create restrictive covenants. In 1979, the Smiths purchased a 101-acre tract that they intended to divide into lots for single-family residential development. At that time, the Smiths did not have a specific configuration or timetable in mind. In 1980, the Smiths sold a lot to the Kings by a deed that contained various restrictive covenants, including that no structure other than a single-family residence and attached garage may be built on the lot. The deed also provided that “[t]hese restrictions may be modified and exception made thereto, if 80% of the owners of similarly-situated land and the grantor, should he own adjacent land, even though unrestricted, so agree.”¹⁰³ The concept of “similarly-situated land” was not defined.

In 1993, the Smiths platted their three remaining lots together as the Don Smith Subdivision, in order to comply with Franklin County’s Unified Zoning Ordinance. The plat of the subdivision contained restrictions substantially the same as those contained in the King deed. Although the King lot appears on the plat, apparently because it abuts the subdivision, it is not part of the subdivision. In 2001, the Ebrens, owners of a lot in the subdivision, received permission from Franklin County to construct a pole barn on their lot. After the Ebrens began construction, the Kings objected and asserted that the Ebrens were in violation of the restrictive covenant. The Ebrens completed their barn and the Kings and the owners of an adjoining parcel, the Stuckeys, filed a complaint for injunctive relief. The trial court dismissed the complaint, finding that the Kings and the Stuckeys had no standing because they were not owners of lots in the subdivision.¹⁰⁴ The homeowners appealed.

The court of appeals affirmed the trial court, finding that the Kings and the Stuckeys were not beneficiaries of the restrictive covenant burdening the Ebrens lot and therefore that they had no standing to sue.¹⁰⁵ The core issue was whether the method in which the Smiths divided their land and purported to impose restrictive covenants on the lots was sufficient to actually create an integrated system of restrictive covenants. Because this case dealt with a restriction on a lot in the platted subdivision, the analysis was relatively straightforward—the King and Stuckey lots were not in the subdivision and their reference to “similarly-situated land” was not clear enough to encumber the subdivision, whose plat contained no reference to the restrictions in their deeds. Judge Baker dissented, arguing that the facts show that the Smiths had a common plan of development for the land including the King, Stuckey, and Ebrens lots, and that the Kings and Stuckeys would therefore have standing to enforce the restrictive covenant on the Ebrens lot.¹⁰⁶

102. 804 N.E.2d 821 (Ind. Ct. App. 2004).

103. *Id.* at 823-24.

104. *Id.* at 824.

105. *Id.* at 834.

106. *Id.* at 832-33 (Baker, J., dissenting).

The court of appeals did not discuss whether the Ebrens were bona fide purchasers without notice of the restrictive covenants in the King and Stuckey deeds. Such analysis would have been interesting, particularly in light of Judge Baker's statement in his dissent that "the Ebrens were not without notice. All the parcels at issue here were part of Smith's original tract. The deeds from the lots that made up the original tract could have been inspected to determine which lots were within Smith's original common plan."¹⁰⁷ The suggestion by Judge Baker that inquiry notice would require the purchaser of a lot in a platted subdivision to examine the deeds of surrounding parcels to determine if they were carved out from a larger original tract which may have had a common plan is strikingly more burdensome on a purchaser than the standard articulated in *S&S Enterprises*, which states that a purchaser is on inquiry notice if the facts are such as to put a "reasonably prudent person upon inquiry."¹⁰⁸

Also delayed for another day is the larger question of whether the language in the King and Stuckey deeds was sufficient to create any restrictive covenants at all because it does not contain a description of the "similarly-situated land."

IV. TITLE AND RECORDING

In *Bank of New York v. Nally*,¹⁰⁹ discussed in last year's article, the court of appeals somewhat muddled Indiana common law regarding the nature and scope of constructive notice. The Indiana Supreme Court granted transfer during the survey period, vacated the lower court opinion, and provided much-needed clarity on the central issue of the case.¹¹⁰

On a single day, three documents were executed: (1) a deed from Owens to Nally (the "Deed"); (2) a mortgage for the majority of the purchase price to Amtrust Financial Services (the "Amtrust Mortgage"); and (3) a mortgage for the remainder of the purchase price from Nally to Owens, which was expressly subordinate to the Amtrust Mortgage (the "Owens Mortgage"). The Owens Mortgage was recorded ten days after the closing, and the Deed and the Amtrust Mortgage were recorded a month later. Nearly two years later, Nally refinanced with EquiVantage to pay off the Amtrust Mortgage, but not the Owens Mortgage. EquiVantage's title search did not reflect the Owens Mortgage. EquiVantage later assigned its mortgage, and the Bank of New York relied upon EquiVantage's title work. In 2000, the Bank of New York sued to foreclose its mortgage. Four months later, the Owens intervened as third party plaintiffs and sought to foreclose on their mortgage, which they claimed was superior to the Bank's. The Bank of New York responded that it was a bona fide purchaser without notice of the Owens Mortgage.

Since the Owens Mortgage was recorded before the Deed, but the two

107. *Id.* at 833 (Baker, J., dissenting).

108. *S&S Enters. v. Marathon Ashland Petroleum, LLC*, 799 N.E.2d 18, 25 (Ind. Ct. App. 2003).

109. 790 N.E.2d 1071 (Ind. Ct. App. 2003).

110. *Bank of New York v. Nally*, 820 N.E.2d 644 (Ind. 2005).

documents were executed on the same day, the central question in this case is the meaning of "chain of title" and the purchaser's duty to search the mortgagor-mortgagee index. The court cited authority that "[t]he period of notice, and hence the period of search, extends as to a particular owner from the date that he acquires title (not the date at which the transfer is recorded) to the date of the recording of a conveyance by him."¹¹¹ The fact that the Owens Mortgage was recorded before the Deed, the court held, did not

relieve EquiVantage of its duty to search the mortgagor-mortgagee index back to December 16, 1996, the date of Nally's deed according to the public record. Because the Owens mortgage was recorded after the date the deed to Nally was executed, the mortgage was within the chain of title at the time EquiVantage made its mortgage. EquiVantage was therefore on constructive notice of its existence.¹¹²

*Dreibelbiss Title Company v. Fifth Third Bank*¹¹³ involved a situation in which in 1998, Cynthia Blevins obtained an open-ended fifteen-year line of credit with Fifth Third's predecessor. In 1999, Blevins apparently refinanced her home and Dreibelbiss handled the closing. Fifth Third provided the title company with a payoff form that instructed the title company to have Blevins sign a letter authorizing Fifth Third to close her home equity account and release the mortgage securing it. The title company prepared a letter that Blevins signed and forwarded to Fifth Third along with the amount specified in the payoff form, but the letter did not instruct Fifth Third to close the account and release the mortgage. In 2000, Blevins took another advance on her line of credit. The title company demanded that Fifth Third release the mortgage in accordance with Indiana Code section 32-28-1-1. Fifth Third moved for and received summary judgment on the argument that the line of credit agreement and the payoff form clearly and unambiguously required Blevins to submit a written request to close the line of credit account. The court of appeals agreed with the trial court that by failing to submit such written request, the title company and Blevins failed to meet Fifth Third's condition for release of the mortgage.¹¹⁴

V. LAND USE

In *Fulton County Advisory Plan Commission v. Groninger*,¹¹⁵ the Indiana Supreme Court vacated an earlier decision by the court of appeals.¹¹⁶ The Groningers applied for preliminary plat approval for a residential subdivision that would enter and exit onto County Road 300 South, a highway. The Fulton County Advisory Plan Commission (the "Commission") refused to approve the

111. *Id.* at 650 (quoting 4 AMERICAN LAW OF PROPERTY § 17.19 (1952)).

112. *Id.* at 651.

113. 806 N.E.2d 345 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 978 (Ind. 2004).

114. *Id.* at 349-50.

115. 810 N.E.2d 704 (Ind. 2004).

116. 790 N.E.2d 541 (Ind. Ct. App. 2003).

plat because it did not comply with the Vision Clearance Standards articulated in the Fulton County Zoning Ordinance.¹¹⁷ The Vision Clearance Standards contain three standards—two of which state specific conditions under which a curb cut will not be permitted (i.e., a minimum of x feet from the crest of a hill, with a specific slope and speed limit) and a third catch-all: “The visibility to or from the desired location is determined to be impaired by the Zoning Administrator.”¹¹⁸ The court of appeals found that this standard was not sufficient to give a member of the public notice of what the “Plan Commission will consider when reviewing a plat application to determine if highway visibility is impaired” and upheld the trial court’s decision to mandate the Commission to grant plat approval.¹¹⁹ The Indiana Supreme Court granted transfer and vacated the decision of the court of appeals.

The court cited Indiana Code section 36-7-4-702(b), which provides that a subdivision control ordinance “must specify the standards by which the commission determines whether a plat qualifies for primary approval.”¹²⁰ The court of appeals decision rested on the theory that the Fulton County Zoning Ordinance did not define the vision clearance standards with “sufficient precision” to meet the requirements of the Indiana Code. The determination of this issue, stated the court, “turns upon whether the language and requirements of the ordinance can be understood with ‘reasonable certainty,’” citing previous decisions that held that a valid ordinance must be “concrete” and “precise, definite, and certain in expression.”¹²¹

The Groningers argued that the court should view each of the three standards separately, and that if the third “catch-all” standard were viewed in isolation, it would not be sufficiently precise to comply with Indiana Code section 36-7-4-702(b). The court found this reading of the ordinance to be “contrary to its plain language.”¹²² Instead, the court emphasized that the first two standards set forth minimum standards that would only be acceptable if, pursuant to the third standard, the Zoning Administrator did not find some other impediment to visibility, such as foliage, or the grade or shape of the road.¹²³ The court noted that the court of appeals has previously upheld zoning ordinances with similar requirements.¹²⁴

The *Miller v. St. Joseph County Area Board of Zoning Appeals*¹²⁵ decision is interesting because while it rejected the appellant’s petition, the result granted the appellant what he had sought in the first place. Robert Miller owned a residential parcel adjacent to a childcare center owned by Michael Garatoni,

117. 810 N.E.2d at 705-06.

118. *Id.* at 706.

119. 790 N.E.2d at 546.

120. 810 N.E.2d at 707.

121. *Id.* at 707-08.

122. *Id.* at 708.

123. *Id.*

124. *Id.* at 709.

125. 809 N.E.2d 356 (Ind. Ct. App. 2004).

Growing Kids. Garatoni sought a variance so that he could build an addition to his center in the setback area of his projects that adjoins Miller's property. Garatoni and Miller privately negotiated conditions upon which Miller would agree to not oppose the variance request, including the maintenance of a sixteen-foot buffer along the length of the property line and the planting of some additional trees. On December 4, 2002, the Board of Zoning Appeals granted Garatoni's variance and ordered that the conditions agreed upon by Garatoni and Miller were to be incorporated into the decision of the Board. Miller filed a motion to correct error with the Board, noting several errors in the Board's description of the conditions. In response, the Board issued a revised order on February 5, 2003, which stated that Garatoni's buffer must run a minimum of approximately 275 feet from the north property line. Miller filed a motion for review with the St. Joseph Superior Court on March 7, 2003. Indiana Code section 36-7-4-1003 permits a party aggrieved by a decision of the board of zoning appeals to file a verified petition within thirty days after the decision of the board.¹²⁶ Miller's petition was filed more than thirty days after both orders, therefore, the court of appeals upheld the decision of the trial court that his challenges to those orders cannot be considered.

However, the court of appeals noted that in his appellee's brief, Garatoni "conceded that the second order did not change the requirement that he maintain a sixteen-foot buffer along the entire western property line."¹²⁷ Given his concession that "[t]he Board did not mean to limit the buffer requirement to the northernmost 275 feet," the court of appeals concluded that "Garatoni is judicially estopped from asserting a contrary position in any future legal proceeding."¹²⁸ Since Miller's lawsuit is presumably based upon his concern that the inconsistencies between the first and second order may lead to an infringement of the conditions agreed upon by Garatoni and Miller, the court of appeals decision, while dismissing his claim, also has the effect of granting Miller what he originally bargained for.

The opinion *Borsuk v Town of St. John*,¹²⁹ was issued by the court of appeals during the survey period. After the survey period, the Indiana Supreme Court granted transfer and vacated the opinion.¹³⁰ Borsuk owned a parcel of land at the intersection of 109th Street and U.S. 41 in the town of St. John. Half of the parcel was zoned commercial and half was zoned residential. The remainder of the block was zoned commercial and the comprehensive plan called for Borsuk's real estate to be rezoned as commercial. Borsuk petitioned to rezone his parcel to commercial. Remonstrators, including the principal of the local elementary school, appeared citing traffic and congestion concerns. The Plan Commission denied the rezone request, finding that it would not promote the health and safety

126. IND. CODE § 36-7-4-1003 (2004).

127. 809 N.E.2d at 359.

128. *Id.* at 360.

129. 800 N.E.2d 217 (Ind. Ct. App. 2003), *trans. granted*, 812 N.E.2d 806 (Ind. 2004), *aff'd in part, vacated in part*, 820 N.E.2d 118 (Ind. 2005).

130. *Id.*

of the Town. The Town Council adopted the Plan Commission's recommendation. Borsuk appealed. The Town submitted two affidavits to the trial court as evidence, one from an engineer which stated that Borsuk could erect a commercial building on the half of the parcel currently zoned commercial, and one from the president of the Plan Commission, which purported to state what issues were considered by the Commission. The trial court found in favor of the Town, finding that Borsuk could use the half of his parcel zoned commercial for a "reasonable and viable commercial purpose."¹³¹ Borsuk appealed on two grounds: (1) that the affidavits were not competent evidence and should not have been admitted by the trial court and (2) that the trial court's decision was arbitrary and capricious. The court of appeals agreed that the affidavits were improperly admitted because Indiana common law provides that "[e]vidence outside of the board's minutes and records that the board presumed to act in its official capacity is not competent evidence to substitute for the minutes and records of regular board action."¹³² In addition, the court found that the engineer's affidavit was contrary to both the administrative record and the town ordinances. Finding that the Town is required to make rezoning decisions in accordance with the comprehensive plan, the court of appeals held that the Plan Commission's denial of Borsuk's rezoning petition was arbitrary and capricious.¹³³

VI. EMINENT DOMAIN

The Indiana Supreme Court addressed two matters of first impression in *State v. Bishop*¹³⁴ involving the taking by the State of Indiana of property in Hendricks County, Indiana, for the purposes of constructing a cloverleaf exchange at Interstate 70. In December 1996 the State commenced an action to take the land in question consisting of a little over one acre of land owned by the Bishops upon which were located four billboard signs. The court-appointed appraisers determined that the fair market value of the property was \$191,510 to which the State promptly filed objections. The Bishops never filed any objections.¹³⁵ The State then deposited that amount with the court, which was then, without objection from the State, paid over to the Bishops. The Bishops also around this time sold the billboards that were located on the property to an outdoor advertising company for \$2000 and granted an easement in the Bishop's remaining property to that company in order to place the signs for approximately \$598,000. The parties undertook discovery and then attempted to mediate their differences but no settlement occurred. A little over two years after the

131. *Id.* at 222.

132. 800 N.E.2d at 221 (quoting *Scott v. City of Seymour*, 695 N.E.2d 585, 590 (Ind. Ct. App. 1995)).

133. *Id.* at 223.

134. 800 N.E.2d 918 (Ind. 2003).

135. *Id.* at 920.

appraisers made their report as to the fair market value of the property, the State moved the court to withdraw its objections to the report and enter judgment to the State.¹³⁶ The court denied that motion. A trial was then held in the matter and the jury returned a verdict establishing the fair market value of the property at \$595,000, and awarded the property owners approximately \$102,000 in interest.

The court of appeals affirmed the trial court and the supreme court accepted transfer. The State's first attack against the verdict consisted of an objection to the trial court's denial of the State's motion to withdraw its objections to the appraisers' report. The withdrawal of the exceptions is an extremely important issue because where only one party has made objection to the appraisers' report and those objections are withdrawn, then there are no further issues for the trial court to pass upon and the matter is concluded.¹³⁷ Because the Bishops never filed objections to the appraisers' report, if the State would have been permitted to withdraw its objections, the case would have been concluded and the verdict would be void. The State argued that a party has the unilateral and absolute right to withdraw its previously made objections.

The supreme court noted that several decisions of the court of appeals have restricted a party's ability to withdraw objections by pretrial order. That being the case, the supreme court, relying principally on the 1998 court of appeals decision in *Daugherty v. State*, held that the trial court has the discretion to permit a party to withdraw its objections.¹³⁸ The supreme court also adopted the *Daugherty* court's four factors for a trial court to consider in permitting a party to withdraw objections, emphasizing that the list was not exclusive. Those four factors are: (1) the time period between the making of the objection and the attempt to withdraw; (2) how close to the time set for trial that the party is attempting to withdraw the objections; (3) whether that non-objecting party has put the trial court and the objecting party on notice that it too is dissatisfied with the appraisers' report; and (4) "the extent of trial preparation that has already occurred."¹³⁹ The supreme court then noted that based on these factors, the trial court did not abuse its discretion in denying the State's motion to withdraw.

The next issue for consideration by the supreme court was the determination of the value of the billboards on the property taken. The court noted that this was a case of first impression for it on this issue. The court noted that the general measure of damages in any takings case is the fair market value of the property so taken. The court also noted that there were generally three different approaches to determine the fair market value, any or all of which could be used to make that determination: (1) the reproduction cost approach; (2) the market data comparison approach; and (3) the income approach.¹⁴⁰ The trial court in this case permitted the Bishops to introduce evidence of the income producing

136. *Id.* at 921.

137. *See* *State v. Redmon*, 186 N.E. 328 (Ind. 1933).

138. 800 N.E.2d at 922 (citing *Daugherty v. State*, 699 N.E.2d 780 (Ind. Ct. App. 1998)).

139. *Id.*

140. *Id.* at 923-24.

potential of the property taken.

The supreme court found error in permitting the Bishops to introduce evidence of the income producing potential of the billboards as that approach is irrelevant in determining the fair market value of billboards taken in this case.¹⁴¹ The court reviewed the holdings of cases from other jurisdictions weighing in on the issue. As a general rule, improvements on realty “are compensable to the extent they enhance the value of the land as a whole.”¹⁴² The court also pointed out that proof of the income to be derived from billboards is rarely admissible unless the owner of the property can show that such owner cannot “relocate a sign within the same market area.”¹⁴³ Further, the court cited cases holding that the “income approach is also limited to situations where the property is being operated as a going concern, is in good condition, and is capable of producing the income to be capitalized.”¹⁴⁴

Based on these principles, the supreme court specifically held that “billboards on condemned property are compensable to the extent that they enhanced the value of the property on the day of the take but not for any ‘lost income’ based on potential future leases.”¹⁴⁵ This approach to billboard valuation makes a good deal of sense and can avoid situations such as the one with the Bishops, where the property owner can simply move the billboards back off of the taken property and still lease or otherwise profit from billboards on that slightly removed location.

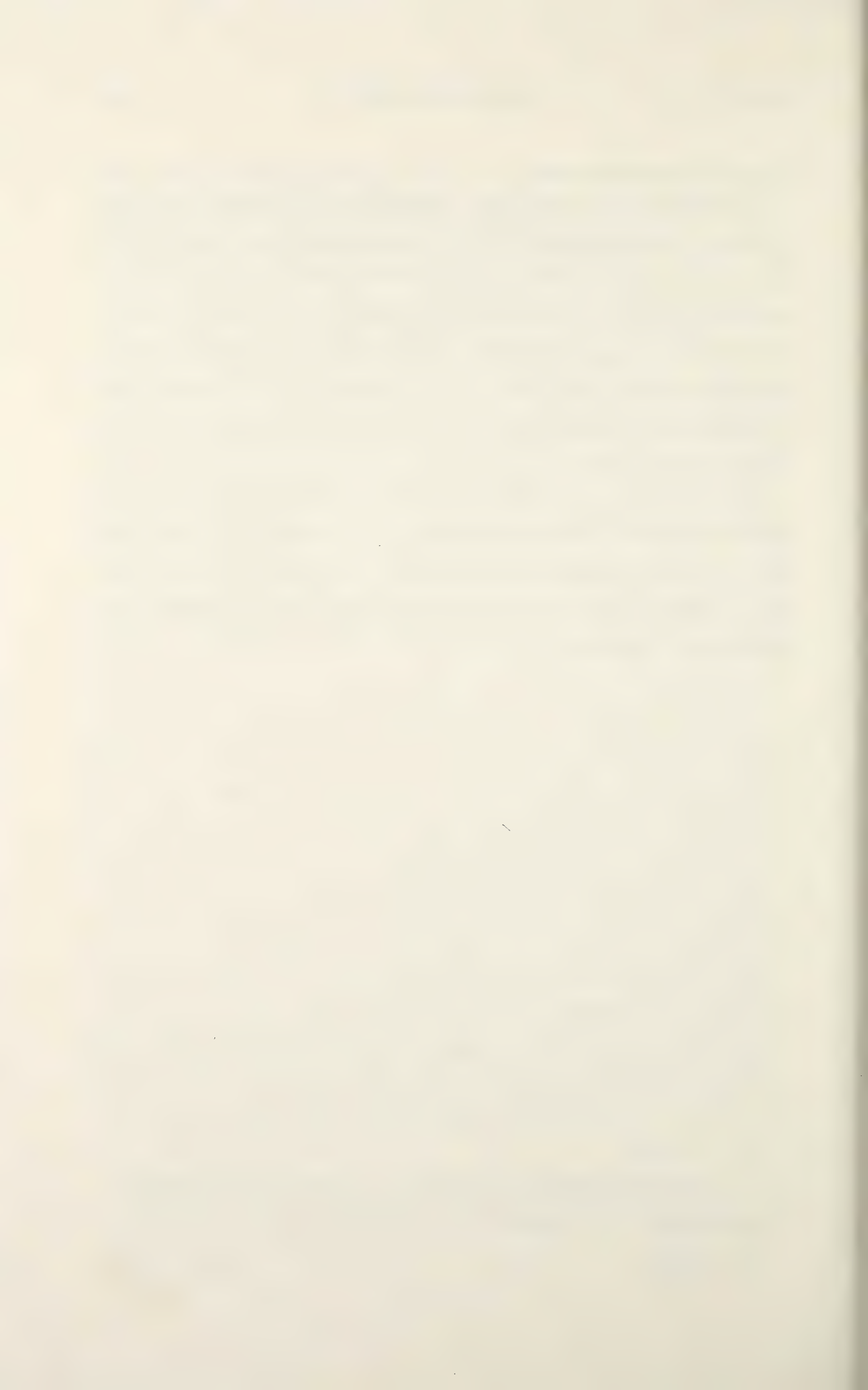
141. *Id.* at 924-25.

142. *Id.* at 924 (quoting Annotation, *Eminent Domain: Determination of Just Compensation for Condemnation of Billboards or other Advertising Signs*, 73 A.L.R.3d 1122, 1125 (2004)).

143. *Id.* at 925.

144. *Id.* at 926.

145. *Id.* at 925.



RECENT DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

The 113th General Assembly, the Governor of Indiana, the Indiana Supreme Court, and the Indiana Tax Court contributed changes to the Indiana tax laws in 2004. This Article highlights the major developments that occurred throughout the year.¹ Whenever the term “General Assembly” is used in this Article, such term shall refer only to the Indiana General Assembly. Whenever the term “State Board” is used in this Article, such term shall refer only to the Indiana State Board of Tax Commissioners. Whenever the term “Indiana Board” is used in this Article, such term shall refer only to the Indiana Board of Tax Review. Whenever the term “Department” is used in this Article, such term shall refer only to the Indiana Department of State Revenue. Whenever the term “Tax Court” is used in this Article, such term shall refer only to the Indiana Tax Court.

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 113th General Assembly passed several pieces of legislation affecting various areas of state and local taxation. The most significant changes were in the area of property taxes. This section highlights the majority of the General Assembly’s changes from 2004 in the areas of corporate tax, sales tax, inheritance tax, and property tax. There are also several other changes noted in the miscellaneous section.

A. Corporate Tax

The General Assembly reduced the minimum size required for a building to be eligible for the Industrial Recovery Tax Credit from 300,000 to 250,000 square feet.² A taxpayer is entitled to a credit against the adjusted gross income tax, insurance premiums tax, or financial institutions tax liability for a “qualified investment” on an industrial recovery site. The building or buildings comprising the industrial recovery site must: (1) contain at least 250,000 interior square feet; (2) be at least twenty years old; and (3) have been at least 75% vacant for at least

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1. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana State Board of Tax Commissioners, and a variety of other tax-related information, visit the Access Indiana website at <http://www.accessindiana.org>.

2. IND. CODE § 6-3.1-11-15 (2004).

two years.³ A qualified investment may consist of expenditures by the taxpayer for rehabilitation (including remodeling, repair, or betterment of real property in any manner or any enlargement or extension of real property, or the installation, repair, or retrofitting of personal property) located within an industrial recovery site under a plan approved by the Enterprise Zone Board.⁴ Depending upon designation of industrial recovery sites by the Enterprise Zone Board, this change could potentially reduce revenue from the Adjusted Gross Income ("AGI") Tax, Insurance Premiums Tax, and Financial Institutions Tax.⁵

The General Assembly enacted legislation that will allow the Randolph County Council to use revenue generated from the county economic development income tax, imposed at a rate of 0.25%, to finance the construction, acquisition, renovation, and equipping of the county courthouse.⁶ This bill changed the legal uses of revenue from the tax, but did not increase the tax rate.⁷

The General Assembly also made changes to simplify the calculation of Indiana net operating loss.⁸ The calculation starts with the taxpayer's federal net operating loss and then the taxpayer must add back state income taxes, property taxes, and charitable contributions, and then, deduct interest on U.S. Government obligations, and finally, apply the apportionment percentage to determine the Indiana portion of the net operating loss.⁹

The General Assembly also made the income tax credit for research expenses permanent by deleting the 2013 expiration date.¹⁰

The General Assembly also authorized the award of refundable "Economic Development for a Growing Economy" ("EDGE") credits to a trust, limited liability company, or limited liability partnership owned wholly or in part by an

3. *Id.* §§ 6-3.1-11-1, -14.

4. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1024 (2004) [hereinafter FISCAL IMPACT STATEMENT 1024], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1024.005.pdf>.

5. *See id.* at 1.

6. IND. CODE § 6-3.5-7-22.5.

7. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1055, at 5 (2005) [hereinafter FISCAL IMPACT STATEMENT 1055], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1055.009.pdf> ("[Public Law] 291-2001 allowed the Randolph County Council to impose an additional 0.25% CEDIT rate in order to finance, construct, acquire, renovate, and equip the county courthouse, the former county hospital (for additional office space), and other additional projects specified under current law. Following the passage of [Public Law] 291-2001, the Randolph County Council raised their CEDIT rate from 0.25% to 0.5%. [Public Law] 224-2003 removed the provision that allowed Randolph County to use additional CEDIT revenue generated by the rate increase allowed under P.L. 291-2001 for courthouse repairs.").

8. IND. CODE §§ 6-3-1-3.5; 6-3-2-2.5, -2.6.

9. *See* LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1365 at 7 (2004) [hereinafter FISCAL IMPACT STATEMENT 1365], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1365.010.pdf>.

10. IND. CODE § 6-3.1-4-6.

electric cooperative that is incorporated in Indiana as a nonprofit corporation.¹¹ The conditions for the refundable EDGE credit include a finding by the EDGE Board that the average wage to be paid by the pass through entity will be at least twice the average wage paid within the county in which the pass through entity's project will be located.¹²

The General Assembly also extended the Hoosier Business Investment Tax Credit for two years through tax year 2007.¹³

In addition, the General Assembly established three new tax incentives for businesses that locate new operations or expand existing operations within the boundaries of: (1) a military base that is scheduled for closing or closed; (2) a Military Base Reuse Area; (3) an Economic Development Area established in connection with a closed military base; or, (4) a Military Base Recovery Site.¹⁴ As of March 10, 2004, there were three known areas in Indiana that were both Enterprise Zones and Military Base Reuse Areas—Grissom Air Force Base in Miami County, Fort Benjamin Harrison in Marion County, and the Indiana Army Ammunition Plant in Clark County.¹⁵

The tax incentives provided by the General Assembly to the qualifying businesses were as follows: (1) A sales tax exemption on the sales of utility services or commodities made to the qualifying business within five years of the start of the new operations;¹⁶ (2) an adjusted gross income tax rate of 5% (versus 8.5%) for the year of relocation and the following four taxable years;¹⁷ and, (3) a military base investment cost credit against state tax liability for a taxpayer who purchases an ownership interest in or otherwise invests in a qualifying business.¹⁸ These incentives are not available to a business that does not have operations in a qualified area and that substantially reduces or ceases its operations somewhere

11. *Id.* §§ 6-3.1-13-7, -21.

12. *Id.*

13. *Id.* § 6-3.1-26-26. "[T]he EDGE Board is authorized to award a taxpayer (an individual, corporation, partnership, or other entity with a tax liability) a nonrefundable tax credit for expenditures on qualified investment that the Board determines will foster job creation and higher wages in Indiana. The tax credit is equal to 30% of the qualified investment. A taxpayer may claim the credit against a taxpayer's Adjusted Gross Income (AGI) Tax, Insurance Premiums Tax, or Financial Institutions Tax liability. If a pass through entity does not have a tax liability, the credit may be claimed by shareholders or partners in proportion to their distributive income from the pass through entity. The tax credit may only be awarded for qualified investment made during tax year 2004 or 2005. The credit is nonrefundable and may not be carried back. Unused tax credits may be carried over for up to nine years after the year in which the investment was made. The credit amount that the taxpayer may *claim* in the taxable year in which the investment is made is equal to the lesser of: (1) 30% of the qualified investment or (2) the taxpayer's state tax liability growth." FISCAL IMPACT STATEMENT 1365, *supra* note 9, at 5.

14. *See* FISCAL IMPACT STATEMENT 1365, *supra* note 9, at 8-9.

15. *See id.* at 9.

16. IND. CODE § 6-2.5-4-5(c)(4).

17. *Id.* §§ 6-3-2-1, -1.5.

18. *Id.* § 6-3.1-11.6-4.

else in Indiana in order to relocate that operation within the qualified area.¹⁹

The General Assembly also expanded the number of taxpayers that could claim the Community Revitalization Enhancement District ("CRED") Tax Credit.²⁰ If a taxpayer is otherwise entitled to the CRED Tax Credit for a taxable year then the taxpayer may claim the credit whether or not the incremental income or sales tax revenue has been deposited in an incremental tax financing fund or allocated to the District.²¹ Also in relation to the CRED Credit, the General Assembly provided new conditions under which a taxpayer that reduces operations somewhere in Indiana to relocate to a District can remain eligible for the credit.²² These new conditions are as follows.

The taxpayer relocates all or part of its non-CRED operations [for any of the following reasons] or . . . the taxpayer has not terminated or reduced the pension or health insurance obligations payable to employees or former employees of the non-CRED operation with their consent:

- (A) The lease on property necessary for the non-CRED operation has been involuntarily lost through no fault of the taxpayer.
- (B) The space available at the location of the non-CRED operation cannot accommodate planned expansion needed by the taxpayer.
- (C) The building for the non-CRED operation has been certified as uninhabitable by a state or local building authority.
- (D) The building for the non-CRED operation has been totally destroyed through no fault of the taxpayer.
- (E) The renovation and construction costs at the location of the non-CRED operation are more than 1.5 times the costs of purchase, renovation, and construction of a facility in the CRED, as certified by three independent estimates.
- (F) The taxpayer had existing operations in the district, and the nondistrict operations relocated to the district are an expansion of the taxpayer's operations in the district.²³

Further, the General Assembly established the Interim Study Committee on Corporate Taxation to study the establishment and utilization of passive investment corporations by companies doing business in Indiana.²⁴

19. *Id.* §§ 6-3-2-1, -1.5; 6-3.1-11.6-13.

20. *Id.* § 6-3.1-19-3.

21. *Id.*

22. *Id.* Previously any taxpayer substantially reducing operations to relocate was per se ineligible for the credit unless "(1) the taxpayer had existing operations in the CRED; and (2) the operations relocated to the CRED are an expansion of the taxpayer's operations in the CRED." See FISCAL IMPACT STATEMENT 1365, *supra* note 9, at 10.

23. FISCAL IMPACT STATEMENT 1365, *supra* note 9, at 11.

24. *Id.* at 3. The Committee's final report is available at <http://www.in.gov/legislative/>

B. Sales Tax

The General Assembly also provided that in a sale of bundled telecommunication services, which include both taxable and nontaxable services, the part of the services not ordinarily subject to the state sales tax is taxable unless the provider can reasonably identify the nontaxable part based on the provider's regularly kept business records.²⁵ Charges for phone calls made within the state are subject to Indiana's sales tax, while charges for long distance interstate calls are not.²⁶ Prior to this enrolled act, if the taxable and nontaxable service charges were not separately stated on the customer's bill, the entire bundled service charges were subject to the sales tax.²⁷ This legislation allows phone companies to state the bundled service charge on the bill and only remit the sales tax on the portion of the package that would be taxable if that portion of the service had been separately stated on the bill.²⁸

Also, the General Assembly made two changes to the sales and use tax credits and exemptions associated with the sale of motor vehicles, trailers, watercraft, and aircraft. The first change allows credit against Indiana's sales and use tax for sales and use tax paid to another state.²⁹ The transactions most affected were purchases of a vehicle by Indiana residents from an out of state dealer. For example, if an Indiana resident were to buy an automobile in Virginia and pay a 4% sales tax in Virginia and immediately bring the vehicle back to Indiana for titling, then this person would receive a credit of 4% against Indiana's use tax of 6%, and therefore, would be liable for 2% in use tax to Indiana.³⁰ Previously, Indiana did not allow a credit for sales or use tax paid to another state in a transaction which involved the sale of a motor vehicle, trailer, watercraft, or aircraft.

In addition, the General Assembly repealed a provision that previously allowed for an exemption from Indiana's sales tax with respect to a purchase of a motor vehicle, trailer, watercraft, or aircraft which was immediately transported out of Indiana to be titled in another state.³¹

The General Assembly also repealed the sales tax with respect to complimentary hotel rooms, effective April 1, 2004.³² The Legislative Services Agency estimated that repealing this provision would reduce state sales tax

interim/committee/icct.html (last visited Apr. 20, 2005).

25. IND. CODE § 6-2.5-4-6(d).

26. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1114, at 1 [hereinafter FISCAL IMPACT STATEMENT 1114] (2004), available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1114.006.pdf>.

27. *See id.*

28. *See id.*

29. IND. CODE § 6-2.5-3-5 (part (b) was deleted).

30. *See* FISCAL IMPACT STATEMENT 1365, *supra* note 9, at 5 for another example.

31. IND. CODE § 6-2.5-5-15 (2003) (repealed 2004).

32. *Id.* §§ 6-2.5-4-4.5, -6-15 (2003) (repealed 2004).

revenues by about \$2.1 million each year.³³

Further, the General Assembly passed legislation specifying that satellite broadcasts of radio or television signals that terminate in Indiana are subject to Indiana's sales tax.³⁴

With respect to sales tax deductions, the General Assembly provided that deductions for bad debt are only assignable if the retail merchant that paid the sales tax liability assigns the right to the deduction in writing.³⁵

The General Assembly also expanded the standards for determining whether or not an out-of-state business entity must register as a retail merchant in Indiana and collect Indiana's sales and use tax.³⁶ In conjunction with this provision the General Assembly expanded the definition of the term "retail merchant engaged in business in Indiana" in the use tax statute to include entities engaging in activities such as installing, repairing, assembling, setting up, accepting returns of, billing, or invoicing the "sales of tangible personal property or services to be used, stored, or consumed in Indiana."³⁷

The General Assembly passed legislation providing that installation charges which are separately stated on a retail merchant's invoice are not subject to the sales tax.³⁸ The General Assembly also specified that "delivery charges" included, but were not limited to, charges for transportation, shipping, postage, handling, crating, and packing.³⁹ In relation to delivery charges, the General Assembly specified that for purposes of a retail merchant making a retail transaction, "a transfer is considered to have occurred after delivery of the property to the purchaser."⁴⁰

C. Inheritance Tax

The General Assembly enacted legislation stating that, for purposes of the Inheritance Tax, a stepchild of the transferor is a Class A transferee.⁴¹ Prior to this legislation, Class A transferees under the Inheritance Tax included both (1) legally adopted children and (2) children who have been part of a *loco parentis* relationship for at least ten years where the relationship began before the child's

33. See FISCAL IMPACT STATEMENT 1365, *supra* note 9, at 6.

34. IND. CODE § 6-2.5-4-11 (2004). Note that this language is a response to the Tax Court's decision in *Grand Victoria Casino & Resort, LP v. Indiana Department of State Revenue*, 789 N.E.2d 1041, 1044-1045 (Ind. Tax Ct. 2003), where the Tax Court held that Grand Victoria was entitled to a refund of sales tax paid on the purchase of satellite services that originated in Kentucky and terminated in Indiana.

35. IND. CODE § 6-2.5-6-9.

36. *Id.* § 6-2.5-8-10.

37. *Id.* § 6-2.5-3-1 (the activities listed were added to the activities otherwise listed).

38. *Id.* § 6-2.5-1-5(b)(6).

39. *Id.* § 6-2.5-1-5(a).

40. *Id.* § 6-2.5-4-1(e).

41. *Id.* § 6-4.1-1-3.

fifteenth birthday.⁴² Therefore, the General Assembly expanded the definition of Class A transferee to include all stepchildren.⁴³ Previously, the individuals affected were classified as Class C transferees rather than Class A transferees for purposes of the standard Inheritance Tax exemption.⁴⁴ The amount of the exemption for Class A transferees is \$100,000 while the amount of the exemption for Class C transferees is \$100.⁴⁵

Also, the General Assembly passed legislation providing that for inheritance tax purposes an adopted child is not considered a Class A transferee, unless the child was adopted before the child was totally emancipated.⁴⁶

D. Property Tax

The General Assembly made changes to the property tax system to better accommodate the needs of the taxpayers. These changes included the option for the Department of Local Government Finance to allow taxpayers to pay in installments and also options for the Department to waive penalties.⁴⁷ The General Assembly also made changes to the taxpayer's notice and process for appealing assessments⁴⁸ including allowing the taxpayer to receive their refund automatically by eliminating the requirement for a taxpayer to file a claim for refund after a successful assessment appeal.⁴⁹

Other changes made by the General Assembly to accommodate taxpayers include allowing counties to issue provisional tax statements if the actual bills are not going to be delivered in a timely manner. The General Assembly also passed legislation permitting an individual who was eligible for, but who did not apply for the homestead credit (and/or certain deductions) prior to October 1, 2003, to obtain such a credit if the individual applied for the credit before December 15, 2003.⁵⁰ The General Assembly also increased the cap on the income tax deduction for property taxes paid on a principal place of residence for homeowners who pay property taxes imposed for the March 1, 2002, or January 15, 2003 assessment dates in 2004.⁵¹ The General Assembly also required the Commission on State Tax and Financing to study elimination of property taxes

42. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1154, at 1 (2004) [hereinafter FISCAL IMPACT STATEMENT 1154], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1154.007.pdf>.

43. *See id.*

44. *See id.* at 2.

45. *See id.*

46. IND. CODE § 6-4.1-1-3.

47. *Id.* §§ 6-1.1-21-5, -22-9, -37-9, -37-10, -37-10.5.

48. *Id.* §§ 6.1.1-4-38, -15-1, -15-2.1, -15-3, -15-4, -15-10; Act of Dec. 12, 2003, § 79, 2004 Ind. Acts 1.

49. *Id.* § 6-1.1-15-11.

50. Act of Dec. 12, 2003, § 68, 2004 Ind. Acts 1.

51. IND. CODE § 6-3-1-3.5(f).

and alternative sources of revenue.⁵²

The General Assembly authorized the Department of Local Government Finance to take over the 2003 general reassessment process in a county if the county's equalization study was not submitted to the Department before October 20, 2003 or if the Department determines that the county's reassessment is likely to be inaccurate.⁵³

The General Assembly passed legislation requiring the property tax liability payable in 2006 and thereafter on residential rental properties that have more than four rental units to be computed using the lowest assessed valuation determined by applying each of the following appraisal techniques: (1) cost approach; (2) sales comparison approach; and, (3) income capitalization approach.⁵⁴ This legislation also provided that the gross rent multiplier method is the preferred method for valuing rental properties that have fewer than five rental units and mobile homes.⁵⁵

The General Assembly removed the prohibition against beer, wine, and liquor wholesalers receiving property tax abatements for the redevelopment or rehabilitation of real property in areas designated as economic revitalization areas.⁵⁶

The General Assembly added sanitary sewers as an improvement that may be financed by a municipality by use of the Barrett Law.⁵⁷ For purposes of the Barrett Law applicable to municipalities, the General Assembly, through this legislation, allowed a municipal fiscal officer and municipal works board to establish procedures allowing the municipality to defer collection of a special assessment that is in default by preserving the assessment as a lien upon the property subject to the assessment.⁵⁸ This same legislation also required the collection of the preserved lien: (1) when ownership of the property is transferred; and, (2) before the final bond maturity date.⁵⁹ The General Assembly also provided that deferred assessments are treated similarly to delinquent property taxes.⁶⁰ Prior to this change, an assessment in default must have been collected through: (1) payment in full; (2) foreclosure on the property; or, (3) a conveyance in satisfaction of the assessment.

The General Assembly passed legislation that approved the form of the question to appear on the ballot for the voters to ratify a constitutional amendment concerning property taxes. The form of the question was as follows:

52. Act of Dec. 12, 2003, § 82, 2004 Ind. Acts 1. The Commission on State Tax and Financing Policy's final report is available at <http://www.in.gov/legislative/interim/committee/stfp.html>.

53. IND. CODE § 6-1.1-4-35, -36.

54. *Id.* § 6-1.1-4-39.

55. *Id.*

56. *Id.* § 6-1.1-12.1-3(e)(12)(c).

57. *Id.* § 36-9-37-11.

58. *Id.* § 36-9-37-19 to -22.5.

59. *Id.* § 36-9-37-22.5.

60. *Id.* § 36-7-19-25.

PUBLIC QUESTION #1

Shall Article 10, Section 1 of the Constitution of the State of Indiana be amended to allow the General Assembly to make certain property exempt from property taxes, including (1) a homeowner's primary residence; (2) personal property used to produce income; and (3) inventory?⁶¹

This constitutional amendment was ratified by the voters on November 2, 2004, which completed the constitutional amendment process.⁶² The impact of this amendment will ultimately depend upon future action of the General Assembly.

The General Assembly also passed legislation requiring a closing agent, in a residential real property financing or refinancing, to provide to each customer information on property tax deductions and the homestead credit on a form prescribed by the Department of Local Government Finance.⁶³ The legislation imposes a \$25 penalty on a closing agent who does not comply with this provision.⁶⁴ The legislation also provides that a closing agent is not liable for any other damages which may be claimed by a customer because of the closing agent's failure to provide the appropriate document to the customer.⁶⁵

In addition, the General Assembly passed a bill requiring the Department of Local Government Financing to set up a pilot program for 2005, 2006, and 2007, which program designates five counties⁶⁶ which are to include, with the county's property tax statement, the following information:

- (1) A breakdown showing the total property tax and special assessment liability and the amount of the taxpayer's liability that will be distributed to each taxing unit in the county.
 - (2) A comparison showing any change in the assessed valuation for the property as compared to the previous year.
 - (3) A comparison showing any change in the property tax and special assessment liability for the property as compared to the previous year.
- The information required under this subdivision must identify:
- (A) the amount of the taxpayer's liability distributable to each taxing unit in which the property is located in the current year and in the previous year; and
 - (B) the percentage change, if any, in the amount of the taxpayer's liability distributable to each taxing unit in which the property is located from the previous year to the current year.
- (4) An explanation of the following:

61. Act of Mar. 19, 2004, 2004 Ind. Acts 11.

62. IND. CONST. art. 10, § 1 (see the history line for the ratification date).

63. IND. CODE § 6-1.1-12-43 (2004) (along with conforming language in IND. CODE §§ 28-1-5-6, 28-5-1-26, 28-6.1-6-25, 28-7-1-38, 34-30-2-16.6).

64. *Id.*

65. *Id.*

66. *Id.* § 6-1.1-20-8(d).

- (A) The homestead credit and all property tax deductions.
 - (B) The procedure and deadline for filing for the homestead credit and each deduction.
 - (C) The procedure that a taxpayer must follow to:
 - (i) appeal a current assessment; or
 - (ii) petition for the correction of an error related to the taxpayer's property tax and special assessment liability.
 - (D) The forms that must be filed for an appeal or petition described in clause (C). The department of local government finance shall provide the explanation required by this subdivision to each county treasurer.
- (5) A checklist that shows:
- (A) the homestead credit and all property tax deductions; and
 - (B) whether the homestead credit and each property tax deduction applies in the current statement for the property transmitted under subsection (a)(1) or (a)(2).⁶⁷

Every county is to provide this information beginning in 2008. The legislation also permits each county to voluntarily provide the additional information about property taxes with property tax statements in 2004.⁶⁸ Also, the legislation provides for state reimbursement of expenditures made by a county to provide the additional information, not to exceed a statewide total of \$50,000.⁶⁹

In addition, this legislation establishes the Property Tax Replacement Study Commission, consisting of twenty-four members.⁷⁰ This Commission is charged with studying the affect of eliminating all or part of the current property tax.⁷¹ The Commission is required to submit its work to the Legislative Council by November 30, 2004.⁷² The legislation provides that the Commission will expire on January 1, 2005.⁷³

The General Assembly also authorized the counties of Allen, Grant, Huntington, Madison, and Wells⁷⁴ to provide property tax abatements for logistical distribution equipment and information technology equipment, installed after June 30, 2004 and before January 1, 2006, in economic revitalization

67. *Id.* § 6-1.1-20-8(e) (Also note that "(a)(1) or (a)(2)" refers to IND. CODE § 6-1.1-20-8(a), which requires the county treasurer to transmit the property tax statement either to the liable homeowner or to the mortgage company keeping an escrow account for the homeowner.).

68. *Id.* § 6-1.1-20-8(d).

69. *Id.* § 6-1.1-20-8(g).

70. Act of Mar. 19, 2004, § 39, 2004 Ind. Acts 64.

71. *Id.*

72. *Id.* The Commission published a report available at <http://www.in.gov/legislative/interim/committee/ptrc.html> (last visited Apr. 20, 2005).

73. *Id.*

74. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1005, at 5-6 (2004) [hereinafter FISCAL IMPACT STATEMENT 1005], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1005.008.pdf>.

areas.⁷⁵ These abatements are available for up to ten years.⁷⁶ The equipment eligible for the abatements as logistical distribution equipment includes racks, scanners, separators, conveyors, forklifts, moving equipment, packaging equipment, sorting and picking equipment, and software.⁷⁷ The equipment eligible for the abatements as information technology equipment includes equipment and software used in the fields of information processing, office automation, telecommunication facilities and networks, informatics, network administration, software development, and fiber optics.⁷⁸ Prior to the passage of this legislation, property tax abatement was allowed for new manufacturing equipment and new research and development equipment.

Further, the General Assembly also authorized local governments to impose a property tax abatement fee.⁷⁹ The General Assembly specified that the fee is to be calculated by: (1) determining the additional property taxes the taxpayer would have paid if not for the abatement; and then, (2) multiplying that additional amount by a percentage as determined by the designating body.⁸⁰ The statutory language specifies that the fee could not exceed 15% of the unabated property tax liability or \$100,000.⁸¹ The statute also gives the designating body the right to revoke the abatement if the taxpayer does not pay the fee.⁸²

In addition, the General Assembly passed legislation disallowing the value of federal income tax credits awarded under Section 42 of the Internal Revenue Code to be considered in determining the assessed value of low-income housing tax credit property.⁸³

Also, the General Assembly passed legislation authorizing a religious institution to “retroactively file for a property tax exemption on real property for property taxes payable in 2001 and 2002 if the organization[:] (1) acquired the property in 1999; (2) the property was exempt from property tax in 2000; and, (3) the organization failed to file the required exemption application for 2001 and 2002 taxes.”⁸⁴ A religious institution could also file retroactively if the institution: “(1) acquired the property in 2000 under contract with another religious institution; (2) the property was exempt from property tax in 2000; and (3) the organization failed to file the required exemption application for 2001, 2002, 2003, and 2004 taxes.”⁸⁵ If, after review by the county property tax

75. IND. CODE § 6-1.1-12.1-1(13) (2004).

76. See FISCAL IMPACT STATEMENT 1005, *supra* note 74, at 5.

77. See *id.*

78. See *id.* at 6.

79. IND. CODE § 6-1.1-12.1-14.

80. *Id.* (Designating body is defined in section 6-1.1-12.1-1(7) as “(A) For a county that does not contain a consolidated city, the fiscal body of the county, city, or town. (B) For a county containing a consolidated city, the metropolitan development commission.”).

81. *Id.*

82. *Id.*

83. *Id.* 6-1.1-12.1-14.

84. See FISCAL IMPACT STATEMENT 1055, *supra* note 7, at 3-4.

85. See *id.*

assessment board of appeals and the Department of Local Government Finance the application is approved, the religious institution may file a claim with the county auditor for a refund of the applicable taxes.⁸⁶

The General Assembly also authorized amended business property tax filings for a taxpayer located in Marion County and meeting the conditions of the statute.⁸⁷ A taxpayer is authorized to amend the taxpayer's return for 2002 to claim an industrial waste control facility exemption, an industrial air purification exemption, and an interstate commerce exemption for finished goods inventory to be shipped out of state.⁸⁸

The General Assembly also authorized a youth baseball and softball organization for an additional period in which to file an application for a property tax exemption.⁸⁹

Further, the General Assembly passed legislation increasing certain property tax deductions as follows: (1) elderly,⁹⁰ disabled,⁹¹ and disabled veteran (not service related)⁹² deductions were raised from \$9000 to \$12,480; (2) service related disabled veteran⁹³ from \$12,000 to \$24,960; and, (3) widow of veteran⁹⁴ and World War I veteran⁹⁵ from \$9000 to \$18,720. This same legislation also raised by 108% the deductions for rehabilitated property.⁹⁶

E. Miscellaneous

The General Assembly passed legislation allowing a custodial parent to bring an action to recover delinquent child support by intercepting the child support obligor's state income tax refund.⁹⁷ The legislation required that the noncustodial parent must: (1) be in arrears of \$1500 or more in child support; and, (2) have intentionally violated the terms of the most recent child support order for the petition to intercept the tax refund to be granted.⁹⁸ The General Assembly also provided that even if the custodial parent filed a joint return with the noncustodial parent, the custodial parent could petition the court to intercept

86. Act of Mar. 18, 2004, §§ 13-14, 2004 Ind. Acts 90.

87. *Id.* § 16. The conditions listed involve the previous filing of certain tax forms on certain dates as listed in part (b) of the statute.

88. *Id.*

89. *Id.* § 15. The provision applied to the Southport Little League that failed to renew its exemption.

90. IND. CODE § 6-1.1-12-9 (2004).

91. *Id.* § 6-1.1-12-11.

92. *Id.* § 6-1.1-12-14.

93. *Id.* § 6-1.1-12-13.

94. *Id.* § 6-1.1-12-16.

95. *Id.* § 6-1.1-12-17.4.

96. *Id.* §§ 6-1.1-12-18, -12-22, -12.1-4.1.

97. *Id.* § 31-16-12.5-2.

98. *Id.*

the noncustodial parent's half of the return.⁹⁹ The legislation specifically provided that this option is not available for support orders which were entered in Title IV-D cases.¹⁰⁰ The bill also contained a requirement that the court notify both the noncustodial parent and a person who filed a joint state income tax return with the noncustodial parent of the hearing by certified mail, return receipt requested.¹⁰¹

The General Assembly enacted legislation requiring the Department of State Revenue to collect and maintain information for all retail merchants concerning the merchants' industry codes under the North American Industry Classification System Manual.¹⁰² A portion of retail merchants currently registered in Indiana are categorized in DOR records based on the Standard Industrial Classification ("SIC") codes.¹⁰³ The SIC system was used by government and industry until it was replaced in 1997 by the North American Industry Classification system ("NAICS"). In some cases, it is possible to directly link all of the business types listed under one SIC code to a single corresponding NAICS code. However, many businesses currently classified under the one SIC code also correspond to a number of different NAICS codes. As a result of this legislation, the Department of Revenue was required to develop a method of collecting NAICS codes directly from merchants currently categorized under the SIC system.¹⁰⁴

The General Assembly also eliminated certain tax credits provided to members of the Indiana Comprehensive Health Insurance Association ("ICHIA").¹⁰⁵ Prior to this legislation ICHIA members of the organization were assessed losses based proportionately on the number of premiums collected from Indiana residents who were involved in the ICHIA program. The members were then allowed to take a credit against Indiana Premium Taxes, Adjusted Gross Income Taxes, or any combination of these or similar taxes, or charge higher premiums sufficient to recoup the assessments. Although the General Assembly eliminated the tax credits, members with unused credits are permitted to carryover the remaining credit for tax years beginning after December 31, 2006.¹⁰⁶ However, the carryover credit is limited to 10% per year of the credit that remained on January 1, 2005.¹⁰⁷

The General Assembly extended the deadline from July 1, 2003 to January

99. *Id.* § 31-16-12.5-4(a).

100. *Id.* § 31-14-12-2.5.

101. *Id.* § 31-16-12.5-5(c).

102. *Id.* § 6-2.5-10-5.

103. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT SB 278, at 1 (2004) [hereinafter FISCAL IMPACT STATEMENT 278], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/SB0278.008.pdf>.

104. *See id.*

105. IND. CODE § 27-8-10-2.1. (Note: All carriers, health maintenance organizations, limited service health maintenance organizations, and self-insurers providing health insurance or health care services in Indiana are members of the Indiana Comprehensive Health Insurance Association.).

106. *Id.* § 27-8-10-2.4.

107. *Id.*

1, 2005 for second class cities and the city of Marion, Indiana to be allowed to establish a Professional Sports and Convention Development Areas ("PSCDA").¹⁰⁸ The bill also repealed a statute that prohibited a PSCDA in Gary, Indiana from containing more than one facility or containing a facility used by a professional sports franchise for practice or competitive sporting events.¹⁰⁹ Prior to this change a Gary PSCDA was authorized to contain a facility used principally for convention or tourism-related events.¹¹⁰

A Professional Sports and Convention Development Tax Area is a special zone in which certain state and local tax revenues earned in the area are diverted and deposited into a special fund.¹¹¹ This fund is dedicated to capital improvement in the development area. As of March 10, 2004, PSCDAs were being operated by Marion County, Allen County, Evansville, Huntingburg, and South Bend.¹¹² The state and local taxes that are allowed to be captured by PSCDAs include sales tax and the state and local individual income taxes. This capturing of tax revenue is capped at \$5 per resident of the establishing entity.¹¹³

The General Assembly also passed legislation requiring the maximum appropriation and property tax levy for community mental health centers be recalculated annually based on the increase in the assessed value growth quotient.¹¹⁴ The growth quotient is equal to the six-year average annual increase in Indiana nonfarm personal income.¹¹⁵ The growth quotient was 4.8% in 2003 and 4.7% in 2004.¹¹⁶ After this legislation, all counties will have the same growth rate.

The General Assembly passed legislation requiring the Department of Revenue to compile a list of taxpayers subject to tax warrants in excess of \$1000 that have been outstanding for at least two years.¹¹⁷ This legislation also requires the Department to publish the list on the AccessIndiana website,¹¹⁸ as well as make the list available for public inspection.¹¹⁹ The delinquent taxpayer must be notified two weeks prior to the publishing of their name on the list.¹²⁰

108. *Id.* § 36-7-31.1-9.

109. *See* FISCAL IMPACT STATEMENT 1005, *supra* note 74, at 4.

110. *See id.*

111. *See id.*

112. *See id.* at 5.

113. IND. CODE § 36-7-31.1-10.

114. *Id.* § 6-1.1-18.5-10(a)(1)(A).

115. LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT HB 1320, at 4 (2004) [hereinafter FISCAL IMPACT STATEMENT 1320], available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/HB1320.009.pdf>.

116. *See id.*

117. IND. CODE § 6-8.1-3-16.

118. *See* <http://www.ai.org>.

119. IND. CODE § 6-8.1-3-16.

120. *Id.*

II. INDIANA SUPREME COURT DECISIONS

The Indiana Supreme Court (“supreme court”) rendered a variety of opinions from January 1, 2004, to December 31, 2004. The supreme court issued three opinions in the area of taxation. Two of these decisions involved sales and use taxes and one of them involved an individual’s right to a tax sale surplus.

A. Sales and Use Tax

1. *Indiana Department of Revenue v. 1 Stop Auto Sales*.¹²¹—1 Stop Auto Sales (“Dealership”) was an automobile dealership that sold vehicles on what it called a “buy-here, pay-here” basis.¹²² Dealership loaned its customers the money for both the purchase price and the sales tax due on the vehicle.¹²³ The Department of State Revenue (“Department”) audited Dealership in 1997 and assessed it for an additional sales tax of approximately \$132,000 plus interest.¹²⁴ The Department found that Dealership was deducting all bad and uncollectible debts in computing its sales tax liability, but for purposes of this calculation was not subtracting the value of the property which Dealership was repossessing.¹²⁵ In 2002, the Tax Court held that Dealership’s bad debt deduction from its Indiana sales tax liability was required to be equal to the amount Dealership deducted for federal income tax purposes.¹²⁶ Then, in a 2003 rehearing, the Tax Court reversed itself and held that Dealership “may deduct an amount equal, in part, to the amount of its uncollectible Indiana receivables it removed from its books as a loss for federal tax purposes, not merely the amount it deducted as federal bad debt.”¹²⁷ The supreme court granted the Department’s request for review and reversed the Tax Court’s decision.¹²⁸ Dealership argued that the “equal to” language in Indiana Code section 6-2.5-6-9¹²⁹ applies only to “receivables” and not to “for federal tax purposes,” and also, that the General Assembly did not

121. 810 N.E.2d 686 (Ind. 2004).

122. *Id.*

123. *Id.* at 686-87.

124. *Id.* at 687-88.

125. *Id.* at 688.

126. *Id.* (citing *1 Stop Auto Sales, Inc. v. Ind. Dep’t of State Revenue*, 779 N.E.2d 614 (Ind. Tax Ct. 2002)).

127. *Id.* (quoting *1 Stop Auto Sales, Inc. v. Ind. Dep’t of State Revenue*, 785 N.E.2d 672, 674 (Ind. Tax Ct. 2003) (Op. on reh’g)).

128. *Id.*

129. *Id.* at 687-88 (quoting IND. CODE § 6-2.5-6-9(a) which provides: “In determining the amount of state gross retail and use taxes which he must remit . . . a retail merchant shall deduct from his gross retail income from retail transactions made during a particular reporting period, an amount equal to his receivables which: (1) Resulted from retail transactions in which the retail merchant did not collect the state gross retail or use tax from the purchaser; (2) Resulted from retail transactions in which the retail merchant has previously paid the state gross retail or use tax liability to the department; and (3) Were written off as an uncollectible debt for federal tax purposes during the particular reporting period”).

intend “to incorporate Internal Revenue Code Section 166 mathematics into the calculation.”¹³⁰ Dealership also claimed that their interpretation of the statute was in line with the General Assembly’s intent to allow retail merchants to recover from the Department the amount of sales tax that the customer did not pay as a result of their default on the loan.¹³¹ The supreme court disagreed with Dealership and held that if the General Assembly had intended not to incorporate Internal Revenue Code section 166 mathematics, then the General Assembly would not have referenced federal tax law at all.¹³² The supreme court pointed out that the Tax Court took a similar approach in *Cooper Industries v. Indiana Department of State Revenue*.¹³³ The supreme court also noted that any ambiguity in an exemption statute is to be strictly construed against the taxpayer.¹³⁴ The supreme court was also swayed by the Department’s prior consistent interpretation that bad debt in these cases was net debt, and also the Department’s argument that conventional legal, accounting, and tax jargon considers bad debt or uncollectible debt to mean net debt.¹³⁵

2. *Indiana Department of State Revenue, v. Trump Indiana, Inc.*¹³⁶—Trump Indiana, Inc. (“Trump”) operated a casino riverboat on Indiana’s shore on Lake Michigan.¹³⁷ When Trump bought the boat in 1996, it was built in Florida and delivered in Indiana.¹³⁸ Trump did not pay any sales or use tax to any state, but did pay Indiana real property taxes since 1997.¹³⁹ The Tax Court, in 2003, held that Trump’s boat was not personal property and not subject to use tax in Indiana.¹⁴⁰ The Tax Court held that the boat became real property upon delivery, and therefore, was not subject to the use tax.¹⁴¹ The supreme court reversed, and held that until the boat is actually put to use as a casino riverboat

130. *Id.* at 689 (quoting Appellee’s Br. in Resp. to Pet. for Review at 2).

131. *Id.*

132. *Id.*

133. *Id.* at 689 n.3 (citing *Cooper Indus. v. Ind. Dep’t of State Revenue*, 673 N.E.2d 1209, 1213 (Ind. Tax Ct. 1996) where the Tax Court found that although “the Revenue Department argued that . . . a corporate taxpayer must begin calculating its Indiana adjusted gross income with the total amount the taxpayer reported as taxable income on its federal return. . . . The statute provided that the term ‘adjusted gross income’ shall mean . . . in the case of corporations, the same as ‘taxable income’ as defined in Section 63 of the Internal Revenue Code”). *See also* IND. CODE § 6-3-1-3.5 (2004). The Tax Court in *Cooper* held that the Department was required to calculate taxable income in accordance with Section 63—to use Internal Revenue Code Section 63 mathematics. *Cooper Indus.*, 673 N.E.2d at 1212.

134. *1 Stop Auto Sales*, 810 N.E.2d at 689 (citing *Gen. Motors Corp. v. Ind. Dep’t of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991)).

135. *Id.* at 690.

136. 814 N.E.2d 1017 (Ind. 2004).

137. *Id.* at 1018.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1019.

it was not real property,¹⁴² but rather personal property, and therefore, Trump is liable for use tax on the purchase of the boat.¹⁴³ The supreme court noted that if the definitions of “property” in the property tax statutes were applied in all contexts of the sales and use tax, then many items that are clearly taxable under the sales and use tax would suddenly become non-taxable.¹⁴⁴

*B. Tax Sale Surplus: Lake County Auditor v. Burks*¹⁴⁵

In 1998, the Auditor sold the home where Lonnie Burks (“Burks”) lived in order to satisfy delinquent taxes on the property, which sale brought in more money than was owed in property taxes.¹⁴⁶ Burks, although not the record owner, was the intestate heir and beneficiary under the unprobated will of the deceased record owner.¹⁴⁷ Burks sued for the tax sale surplus on April 12, 2000 and the trial court ruled that as “‘the only surviving heir of the record owner’ of the property, Burks was entitled to the surplus.”¹⁴⁸ The Auditor appealed claiming that under the Indiana Code section 6-1.1-24-7(b), Burks did not fall within the list of people permitted to an administrative refund of the surplus.¹⁴⁹ The statute provides that in certain counties the: (1) owner; (2) purchaser; or, (3) a person with a substantial property interest of record, may file a claim that, if approved by the auditor, would entitle the person to the surplus.¹⁵⁰ Lake County was not included in the statute, and therefore, Burks was not entitled to the administrative claim for the surplus.¹⁵¹ Relying on this statute the court of appeals agreed with

142. IND. CODE § 6-1.1-1-15(5) (2004) (defining a casino riverboat as real property).

143. *Trump*, 814 N.E.2d at 1020.

144. *Id.* (quoting IND. CODE § 6-1.1-1-11(a)(6)). The supreme court’s example here was that: “property tax definitions are designed to impose property taxes on furniture held in inventory by a retailer, but to exempt furniture in a home. This is accomplished by the requirement in item (6) that ‘other property’ be ‘held for sale’ before it is considered ‘tangible personal property.’” *Id.*

145. 802 N.E.2d 896 (Ind. 2004).

146. *Id.* at 897.

147. *Id.*

148. *Id.* at 898.

149. *Id.*

150. *Id.* at 898-99 (citing IND. CODE § 6-1.1-24-7(b) which provides that “[t]he: (1) owner of record of the real property at the time the tax deed is issued who is divested of ownership by the issuance of a tax deed; or (2) tax sale purchaser or purchaser’s assignee, upon redemption of the tract or item of real property; (3) person with a substantial property interest of public record, as defined in section 1.9 of this chapter and as evidenced by the issuance of a tax deed to a tax sale purchaser, in a county: (1) having a population of more than two hundred thousand (200,000) but less than four hundred thousand (400,000); (2) having a consolidated city; or (3) in which the county auditor and the county treasurer have an agreement under [IND. CODE §] 6-1.1-25-4.7; may file a verified claim for money which is deposited in the tax sale surplus fund. If the claim is approved by the county auditor and the county treasurer, the county auditor shall issue a warrant to the claimant for the amount due”).

151. *Id.* at 899.

the Auditor that Burks was not entitled to the surplus.¹⁵² The supreme court reversed the court of appeals and affirmed the trial court, holding that Burks was entitled to the surplus.¹⁵³

The supreme court relied on the court of appeals decision in *Brewer v. EMC Mortgage Corp.*, 743 N.E.2d 322 (Ind. Ct. App. 2001).¹⁵⁴ In *Brewer*, the court of appeals held that subsection (b)(3) of the statute¹⁵⁵ allowed an administrative remedy in the included counties, but the court of appeals also held that the statute was permissive and not mandatory, and therefore, the remedy of a lawsuit remained available in all counties.¹⁵⁶ The supreme court held that although that subsection was removed, the permissive interpretation should apply to the whole statute, and therefore the statute does not preclude Burks from bringing a lawsuit to claim the surplus.¹⁵⁷ The supreme court stated that because the listed parties in the statute are generally easily identified and in most cases there is no dispute that they are the proper claimant, allowing them the quicker, less expensive administrative remedy was a sensible interpretation.¹⁵⁸ The supreme court also noted that interpreting the statute as the court of appeals suggested could present a "taking" of property in violation of the Fifth Amendment to the U.S. Constitution.¹⁵⁹

III. INDIANA TAX COURT DECISIONS

The Indiana Tax Court ("Tax Court") rendered a variety of opinions from January 1, 2004 to December 31, 2004. Specifically, the Tax Court issued eighteen published opinions, ten of which concerned Indiana real property tax matters. The remaining cases are divided as follows: four cases regarding Indiana sales and use tax; three cases involving corporate income tax matters; and one case involving individual income tax. Each decision is summarized separately below.

A. Real Property Taxes

1. *Heart City Chrysler/Lockmandy Motors v. Department of Local Government Finance*.¹⁶⁰—Heart operated a car dealership in Elkhart County, Indiana.¹⁶¹ Heart filed an original tax appeal on June 24, 1999 to dispute the State Board's determination awarding Heart's improvements only a 10%

152. *Id.*

153. *Id.* at 899-900.

154. *Id.* at 899 (citing *Brewer v. EMC Mortgage Corp.*, 743 N.E.2d 322 (Ind. Ct. App. 2001)).

155. IND. CODE § 6-1.1-24-7(b)(3) (removed in a 2001 amendment).

156. 802 N.E.2d 896 at 899.

157. *Id.* at 899-900.

158. *Id.* at 900.

159. *Id.* at 899 (citing *United States v. Lawton*, 110 U.S. 146, 150 (1884)).

160. 801 N.E.2d 215 (Ind. Tax Ct. 2004).

161. *Id.* at 216.

obsolescence depreciation adjustment,¹⁶² as well as the State Board's reduction of the improvements' physical depreciation factor from 45% to 35%. The Tax Court reversed and remanded the case to the State Board, and the Tax Court instructed Heart to quantify the obsolescence of the improvements with generally accepted appraisal techniques.¹⁶³ On rehearing in October of 1999, the State Board kept the obsolescence adjustment at 10% and returned the physical depreciation factor to 45%.¹⁶⁴ On December 2, 1999, Heart filed this second action, appealing the State Board's determination on rehearing.¹⁶⁵ Heart claimed the State Board erred by disregarding Heart's evidence quantifying the obsolescence depreciation present in its improvements.¹⁶⁶ The Tax Court stated that in seeking an obsolescence adjustment Heart was required to: (1) identify causes of alleged obsolescence; and, (2) quantify the amount of obsolescence to be applied to the improvements.¹⁶⁷ The Tax Court in affirming the State Board, found that Heart did quantify the improvements' obsolescence, but failed to link those quantifications to the causes of the obsolescence.¹⁶⁸ The Tax Court found that Heart failed by presenting only a mathematical calculation bearing no relationships to the causes of the obsolescence depreciation that allegedly existed.¹⁶⁹

2. *Indianapolis Racquet Club, Inc. v. Washington Township (Marion County) Assessor*.¹⁷⁰—Indianapolis Racquet Club ("IRC") initiated this action on June 3, 2002, appealing the Assessor's determination to value IRC's "primary" land at \$4.80 per square foot and its "secondary" land at \$3.36 per square foot.¹⁷¹ IRC claims that the Land Order was invalidly applied because IRC's tennis facility was lumped in with noncomparable "high value retail properties."¹⁷² IRC claimed that a "misimprovement" influence factor should

162. *Id.* at 217 (stating that "[o]bsolescence is the functional or economic loss of property value. Functional obsolescence is caused by factors internal to the property; economic obsolescence is caused by external factors. Obsolescence is expressed as a percentage reduction in the remaining value of an improvement") (citations omitted).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* ("Heart requested a 25% adjustment to its 1990 and 1991 assessment, and a 37% adjustment to its 1995 assessment").

167. *Id.* at 218 (citing *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1238 (Ind. Tax Ct.1998)).

168. *Id.*

169. *Id.*

170. 802 N.E.2d 1018 (Ind. Tax Ct. 2004).

171. *Id.* at 1019 n.1 (reasoning "[f]or the 1995 assessment, commercial and industrial land was classified according to its use. Consequently, 'primary commercial or industrial land' refers to the primary building or plant site, whereas 'secondary commercial or industrial land' refers to land utilized for purposes secondary to the primary use of the land") (citations omitted).

172. *Id.* at 1021 (quoting *Pet'r Br.* at 4).

have been applied to its land.¹⁷³ The Tax Court stated that IRC was required to: (1) submit probative evidence to show its parcel had a different use than surrounding parcels; and, (2) submit probative evidence to show that this inconsistent use had a negative impact on the land's value.¹⁷⁴ The Tax Court held that IRC failed to establish that its land's use was different than the surrounding land, and therefore IRC was not entitled to a negative influence factor.¹⁷⁵ The only evidence IRC presented was a transcript from its 1989 appeal on this same issue, and the Tax Court found that the transcript alone was not enough to establish IRC's prima facie case.¹⁷⁶ The Tax Court stated that IRC could not merely say the facts had not changed, but that IRC still was obligated to make a careful, methodical, and detailed factual presentation on the issues presented.¹⁷⁷

3. American United Life Insurance Company (AUL) v. Maley.¹⁷⁸—AUL initiated this action on October 15, 2002, appealing the 1995 assessment of AUL's building.¹⁷⁹ AUL owned an entire city block in downtown Indianapolis on which AUL's thirty-eight-floor building stood.¹⁸⁰ AUL claimed that the Center Township Assessor ("Assessor") should have assigned the building an "A-2" grade factor, instead of an "A" grade factor.¹⁸¹ AUL established its prima facie case for an "A-2" grade by providing a floor by floor analysis by property tax experts.¹⁸² AUL also compared the interior of its building with that of other prominent downtown buildings that all had been assigned "A-2" grades.¹⁸³ AUL conceded that the outside of their building was "A" grade, but claimed the interior was "B+1" grade; therefore, they were entitled to an overall "A-2" grade.¹⁸⁴ After AUL established its prima facie case, the burden then shifted to

173. *Id.* at 1021 n.3 (stating "IRC does not ask for an influence factor per se. Rather, it merely asserts that the appropriate rate to be applied to its land is \$2.40 for 'primary' land and \$1.68 for 'secondary' land. Given the fact that 1) the application of an influence factor is the only way by which the value of IRC's land can be reduced under this Land Order; and 2) a 'misimprovement' influence factor most accurately reflects IRC's argument, this Court construes IRC's request as one for the application of a 'misimprovement' influence factor") (citations omitted).

174. *Id.* (citing *Quality Farm & Fleet, Inc. v. State Bd. of Tax Comm'rs*, 747 N.E.2d 88, 91 (Ind. Tax Ct. 2001)).

175. *Id.* at 1022.

176. *Id.*

177. *Id.*

178. 803 N.E.2d 276 (Ind. Tax Ct. 2004), *trans. denied*, 2004 Ind. LEXIS 450 (Ind. May 14, 2004).

179. *Id.* at 278.

180. *Id.*

181. *Id.* at 279 (the grading of improvements is set forth at IND. ADMIN. CODE tit. 50, r. 2.2-10-3).

182. *Id.* at 280.

183. *Id.* at 281 (buildings compared were Market Tower, First Indiana Plaza, and One Indiana Square).

184. *Id.* at 280.

the Assessor to rebut AUL's evidence.¹⁸⁵ The Tax Court in holding for AUL on this point, found that the Assessor simply failed to impeach or rebut AUL's evidence.¹⁸⁶ AUL next claimed that some of its land should have been valued at \$20 per square foot, instead of all of the land being valued at \$75 per square foot.¹⁸⁷ AUL presented the "Square 34" land order which stated that AUL's land bounded by New York Street from Illinois Street to Capital Avenue was to be valued at \$10-\$20 per square foot.¹⁸⁸ The Tax Court agreed that under the plain meaning of the land order AUL's land was to be valued at \$70-\$100 per square foot, except for the triangle mentioned above.¹⁸⁹ The Tax Court again held for AUL, finding that the Assessor's interpretation that the land order authorized use of one base rate of \$70-\$100 was in error because that interpretation would ignore the \$10-\$20 rate, and the Tax Court presumed that all the language used in the order has meaning.¹⁹⁰ Finally, AUL asserted that it was entitled to a negative influence factor of 25% be applied to its land.¹⁹¹ AUL was seeking a misimprovement influence factor, and thus, AUL was required to submit evidence demonstrating: (1) its land did not have the same use as surrounding land; and, (2) the different use had a negative impact on the land value.¹⁹² The Tax Court found that AUL was not entitled to the negative influence factor.¹⁹³ The Tax Court stated that AUL's evidence that its building only occupied 49% of its parcel versus surrounding buildings occupying 80% to 99% of their parcels was not itself evidence of different "use."¹⁹⁴ The Tax Court also stated that even assuming arguendo that AUL had shown that this was a different "use," they still failed to quantify how the land suffered a loss in value due to that different "use."¹⁹⁵

4. Waterfurnace International, Inc. v. Department of Local Government

185. *Id.* at 281.

186. *Id.* at 282.

187. *Id.* at 283.

188. *Id.* (noting the land order provided "1. \$70-\$100 per square foot for the southern portion of the property bounded by Ohio Street from Illinois Street to Capitol Avenue; 2. \$10-\$20 per square foot for the northern portion of the property bounded by New York Street from Illinois Street to Capital Avenue; and, 3. \$70-\$100 per square foot for a northwest to southeast diagonal portion of the property, which at one time was bisected by Indiana Avenue from Ohio Street to New York Street (Indiana Avenue was vacated in 1979)").

189. *Id.* at 283.

190. *Id.* (citing *The Precedent v. State Bd. of Tax Comm'rs*, 659 N.E.2d 701, 704 (Ind. Tax Ct. 1995)).

191. *Id.* at 284 (citing *Quality Farm & Fleet, Inc. v. State Bd. of Tax Comm'rs*, 747 N.E.2d 88, 91 (Ind. Tax Ct. 2001) (quoting IND. ADMIN. CODE tit. 50, r. 2.2-4-17(c)(8) (1996) "[a]n influence factor 'refers to a condition peculiar to the acreage tract that dictates an adjustment to the extended value to account for variations from the norm'")).

192. *Id.* at 284-85 (citing *Quality Farm & Fleet, Inc.*, 747 N.E.2d at 92).

193. *Id.* at 285.

194. *Id.*

195. *Id.*

Finance.¹⁹⁶—Waterfurnace owned land and improvements in Fort Wayne, Indiana, and initiated this appeal on May 15, 2000 challenging the State Board of Tax Commissioner's final assessment.¹⁹⁷ Waterfurnace claimed that the improvement should have been assessed under the General Commercial Kit ("GCK") schedule and not the General Commercial Industrial ("GCI") schedule.¹⁹⁸ Waterfurnace presented evidence of features establishing that the improvement should have been assessed under the GCK schedule.¹⁹⁹ "Specifically, Waterfurnace's evidence indicated that its improvement has: (1) 26-gauge exterior metal walls; (2) interior metal walls with 4-inch vinyl insulation; and (3) unfinished interior flooring, ceilings, and sidewalls."²⁰⁰ The Tax Court then held that the burden shifted to the State Board to bring forward probative evidence to rebut Waterfurnace's showing.²⁰¹ The State Board in using the GCI schedule relied on the fact that the improvement had a 3-foot high wall and a rubber roof system that were not on the GCK schedule.²⁰² The Tax Court held that this evidence was not enough to rebut Waterfurnace's showing because the State Board provided no evidence of specifically why these features disqualified the improvement from the GCK schedule.²⁰³ Therefore, the Tax Court reversed the State Board's determination and remanded the case with instructions that Waterfurnace's improvement be assessed under the GCK schedule.²⁰⁴

5. *Clarkson v. Department of Local Government Finance*.²⁰⁵—The Clarksons owned and operated a manufacturing facility in Franklin, Indiana, and initiated this appeal on July 6, 1999 to challenge the State Board's 1995 assessment of the facility.²⁰⁶ Specifically, the Clarksons claimed the State Board erred in assessing their property as "commercial" rather than "industrial" under the Johnson County Land Order.²⁰⁷ Because the Land Order did not define "commercial" or "industrial", the Clarksons asked the Tax Court to follow the definitions from the Indiana assessment manual and the Indiana Administrative Code.²⁰⁸ The assessment manual defined the term "land classification" as "the classification

196. 806 N.E.2d 891 (Ind. Tax Ct. 2001) (order published July 14, 2004).

197. *Id.* at 892.

198. *Id.*

199. *Id.* at 893.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 893-94.

204. *Id.* at 894.

205. 812 N.E.2d 255 (Ind. Tax Ct. 2004).

206. *Id.* at 256.

207. *Id.* at 257 (The base rate for "commercial" land could be between \$6500 and \$84,900 per acre, while the rate for "industrial" land is capped at \$19,500 per acre.).

208. *Id.* (citing the Indiana assessment manual and IND. ADMIN. CODE tit. 50, r. 2.2-4-1(13) (1996)).

of land based upon its capabilities for use.”²⁰⁹ The Clarksons presented evidence of their actual primary use of the land for manufacturing.²¹⁰ The Tax Court stated that the State Board had not substantially supported its final determination, and seemed to value the land as “commercial” merely because it was near other commercial properties.²¹¹ Therefore, the Tax Court reversed the State Board, and held that the land should be assessed as “industrial.”²¹²

6. *Keag Family Ltd. Partnership v. Indiana Board of Tax Review*.²¹³—Keag challenged the Indiana Board’s assessment of Keag’s land for the 2000 and 2001 tax years.²¹⁴ In order for the Tax Court to have jurisdiction, Keag first had to get an extension to file the Certified Administrative Record (“Record”).²¹⁵ The State Board mailed the Record to Keag on March 19, 2004 and there exists a rebuttable presumption that once the Record is mailed by the State Board, it is received by Keag.²¹⁶ Keag attempted to rebut the presumption with evidence showing that Keag’s office was closed from March 19, 2004 to April 13, 2004 for “vacation shutdown.”²¹⁷ Keag provided as evidence a return itinerary proving a return date of April 11, 2004.²¹⁸ The Tax Court dismissed the motion for extension holding that Keag had failed to rebut the presumption.²¹⁹ The Tax Court cited as its rationale the lack of departure evidence, and the fact that Keag was still able to file the Record by the Tax Court’s April 21, 2004 deadline.²²⁰

7. *K.P. Oil, Inc. v. Madison Township Assessor*.²²¹—K.P., during the 1997 and 1998 assessment years, owned a platted parcel of land in Jefferson County, Indiana.²²² A Jefferson County Land Order provided that parcels that were not platted should have been priced no higher than \$24,750 per acre, while commercial platted lots should have been priced no higher than \$900 per front foot.²²³ The Assessor, in 1995, assessed the land at the \$900 per front foot rate resulting in a total assessment of \$32,230.²²⁴ K.P. appealed claiming that the

209. *Id.* (citing the Indiana assessment manual).

210. *Id.* at 258.

211. *Id.*

212. *Id.* at 258-59.

213. 815 N.E.2d 567 (Ind. Tax Ct. 2004).

214. *Id.* at 568.

215. *Id.* at 568, 570.

216. *Id.* at 569 (citing *Carter v. Review Bd. of Ind. Dep’t of Employment & Training Servs.*, 526 N.E.2d 717, 718-19 (Ind. Ct. App. 1988) (stating that “when an administrative agency sends notice through the regular course of mail, a rebuttable presumption arises that such notice is received”)).

217. *Id.*

218. *Id.* at 570.

219. *Id.*

220. *Id.*

221. 818 N.E.2d 1006 (Ind. Tax Ct. 2004).

222. *Id.* at 1007.

223. *Id.*

224. *Id.*

parcel should have been assessed at the \$24,750 per acre rate, rather than the \$900 per front foot.²²⁵ The State Board found the land was not platted and reversed the Assessor, holding that the land should be assessed at the \$24,750 per acre rate.²²⁶ The Assessor asked for a rehearing, which was denied.²²⁷ On September 8, 1999 the Assessor performed an interim assessment and found that the land was indeed platted, resulting in a reassessment of the land at the \$900 per front foot rate.²²⁸ The State Board, seeing its mistake from the previous hearing, affirmed the interim assessment. K.P. appealed on November 15, 2002, claiming that the interim assessment was not validly conducted because there were no changes to the subject property between the 1995 general assessment and the 1999 interim assessment.²²⁹ The Tax Court in finding for K.P. held that the State Board error in the first hearing in finding the land was not platted did not justify an interim reassessment when there was no change to the subject property.²³⁰ The Tax Court noted that the Assessor could not have appealed the State Board's first determination because the refund at issue did not meet the minimum jurisdictional requirement for an appeal to the Tax Court.²³¹ The Tax Court, acknowledging that this decision seemed harsh, also noted that the General Assembly, in the 2001 Session, enacted legislation allowing an assessor to petition for judicial review regardless of the amount of refund in controversy.²³²

8. *Majestic Star Casino, LLC v. Blumenburg*.²³³—Majestic Star was an Indiana limited liability company that operated a casino riverboat on Lake Michigan.²³⁴ Majestic was granted their riverboat gaming license at the same time as Trump Casino.²³⁵ Trump had their boat ready for business before Majestic, so in order not to lose the competitive advantage, Majestic leased and renovated a dinner cruise boat (Star I) while waiting for their bigger riverboat (Star II) to be completed.²³⁶ Majestic operated the Star I from June 1996 through October 1997.²³⁷ The State Board's final property tax assessment of the Star I was approximately \$3.2 million.²³⁸ Majestic believed this assessment was too high, and initiated this tax appeal on May 23, 2003.²³⁹ Majestic argued that the

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1008-09.

231. *Id.* at 1009 n.5 (citing IND. CODE § 6-1.1-15-5(e)).

232. *Id.* (citing IND. CODE § 6-1.1-15-5(e)).

233. 817 N.E.2d 322 (Ind. Tax Ct. 2004).

234. *Id.* at 324.

235. *Id.* at 324 n.1.

236. *Id.*

237. *Id.* at 324.

238. *Id.*

239. *Id.*

State Board's assessment violated article X, section 1 of the Indiana Constitution (the "Property Taxation Clause").²⁴⁰ Specifically Majestic argued that this assessment resulted in the Star I, which they claimed was physically still a dinner cruise boat, being assessed at a much higher value as a casino riverboat, and therefore, the assessment violated the Property Taxation Clause requirements of: (1) uniformity and equality in assessment; (2) uniformity and equality as to rate of taxation; and, (3) a just valuation for taxation.²⁴¹ The Tax Court acknowledged the boat had substantially the same physical characteristics,²⁴² but held that Majestic had to prove that the contested classification as a casino riverboat was "not based upon differences naturally inhering in the property or in the subject matter of the legislation that creates the classification."²⁴³ The Tax Court upheld the casino riverboat assessment classification.²⁴⁴ The Tax Court found that the General Assembly's choice to classify casino riverboats separately for property tax assessment purposes was constitutional as based on differences naturally inhering in the subject matter of the legislation that created the classification.²⁴⁵ The Tax Court also held that all taxpayers within the classification were treated equally.²⁴⁶ Majestic also claimed that there was an improper withdrawal of admissions by the State Board at the State Board's hearing in December of 2002.²⁴⁷ The Tax Court agreed with Majestic and reinstated the admissions regarding their entitlement to a 55% physical depreciation adjustment and an 80% obsolescence depreciation adjustment.²⁴⁸ Because the admissions were reinstated, the Tax Court held that Majestic was entitled to the 55% adjustment.²⁴⁹ However, the Tax Court held that Majestic was entitled to only 40.7% of the obsolescence adjustment because although the admission was reinstated, Majestic had argued before the Tax Court that the adjustment was only 40.7%.²⁵⁰

9. Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance.²⁵¹—Westview Hospital ("Westview") and Health Institute of Indiana, Inc. (HII) (collectively "Hospital") filed an original tax appeal in both

240. IND. CONST. art. X, § 1 ("The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal.").

241. *Majestic*, 817 N.E.2d at 325-26.

242. *Id.* at 326.

243. *Id.* at 327-28 (citing *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1037 (Ind. 1998)).

244. *Id.* at 328.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 329.

249. *Id.* at 331.

250. *Id.*

251. 818 N.E.2d 1009 (Ind. Tax Ct. 2004), *trans. denied*, 2005 Ind. LEXIS 375 (Ind. Apr. 14, 2005).

1999 and 2000 appealing the property tax assessment by the State Board of Tax Commissioners of the Hospital's real and personal property that was part of their Healthplex.²⁵² Seventy-four percent of the Healthplex was devoted for use as a sportsclub ("Club") and the other 26% was devoted for use as the medical pavilion ("MP").²⁵³ The Hospital claimed that 100% of the Club and 91% of the MP should be exempt from property tax under Indiana Code section 6-1.1-10-16.²⁵⁴ Both Westview and HII were recognized as I.R.C. section 501(c)(3) organizations.²⁵⁵ In 1999, the State Board originally allowed a 9% exemption on the improvement of the Club and MP property, but after a rehearing, the State Board removed the exemption entirely.²⁵⁶ In 2000, the State Board allowed a 9% exemption only for the improvements to the Club and MP property and denied an exemption for the land on which the facilities sit. The State Board did not allow any exemption for the personal property within the facilities in either 1999 or 2000. The Hospital argued that the land, facility and personal property should all be exempt under the charitable exemption because they were used for the Hospital's charitable purpose. The Hospital specifically argued that "there should be no legal difference between the delivery of health care in the traditional sense . . . and the activities . . . aimed at preventing disease in the first instance."²⁵⁷ The State Board argued that the facility was essentially a commercial health club that was neither affordable nor accessible.²⁵⁸ The Tax Court, relying on an opinion from the 1994 Tennessee Court of Appeals,²⁵⁹ held that the Club did not qualify for the charitable purposes exemption.²⁶⁰ The Tax Court's holding cited, as a relevant factor, the evidence that the Club offers many of the same programs and also advertises to compete with for-profit businesses.²⁶¹ The Tax Court reversed the State Board, in part, in holding that 38% of the MP was entitled to the exemption.²⁶² The Tax Court found that the evidence supported the exemption because 38% of the MP was used to support the inpatient facility (which has a charitable purpose).²⁶³ The Hospital also claimed that the State Board, in denying the exemption, violated article I, section 23 of

252. *Id.* at 1011.

253. *Id.*

254. *Id.* at 1013 (specifically the Hospital relied on IND. CODE § 6-1.1-10-16(a), which provides that "[a]ll or part of a building is exempt from property taxation if it is owned, occupied, and used [] for . . . charitable purposes").

255. *Id.* at 1011 (citing Internal Revenue Code § 501(c)(3) which exempts certain corporations from federal income tax).

256. *Id.* at 1013.

257. *Id.* at 1016.

258. *Id.*

259. *Id.* at 1017 (citing *Middle Tenn. Med. Ctr. v. Assessment Appeals Comm'n of the State of Tenn.*, 1994 WL 32584, at *4 (Tenn. Ct. App. Feb. 4, 1994)).

260. *Id.* at 1018.

261. *Id.*

262. *Id.* at 1019.

263. *Id.* at 1018-19.

the Indiana Constitution (“Equal Privileges and Immunities Clause”).²⁶⁴ The Hospital’s claim was based on the State Board’s granting of a charitable purposes exemption to the Jewish Community Center (JCC).²⁶⁵ The Tax Court stated that a claim asserted under the Equal Privileges and Immunities Clause must pass the two part test from *Collins v. Day*.²⁶⁶ The Tax Court found that although there was evidence that the JCC offered and operated similar programs, there was no evidence of the percentage of use between the charitable and non-charitable purposes.²⁶⁷ Therefore, the Tax Court held that the evidence in the record was insufficient in showing that the JCC and the Hospital were “similarly situated” as is required by the second prong of the test.²⁶⁸

10. *Cooperative, Inc. v. Department of Local Government Finance*.²⁶⁹—Hoosier Energy is owned by sixteen local rural electric membership corporations (“REMCs”).²⁷⁰ Hoosier Energy furnishes energy to the REMCs, and the REMCs then deliver the electricity to the ultimate consumer.²⁷¹ In both 1999 and 2000 the REMCs attempted to file a consolidated property tax return.²⁷² In both years the State Board denied the REMCs filing of consolidated returns, and in both 1999 and 2000 the REMCs filed an original tax appeal.²⁷³ The Tax Court consolidated the appeals into this single action and affirmed the State Board in denying the REMCs’ requests to file consolidated returns.²⁷⁴ The REMCs wanted to file consolidated returns to lower their assessed valuation, because they then would have been eligible to take a larger accumulated depreciation deduction.²⁷⁵ The REMCs argued that because three investor owned electric utilities (“IOUs”) had been permitted to file consolidated returns, the State Board, in denying this consolidated filing, violated article X, section 1 of the

264. *Id.* at 1019 (citing IND. CONST. art. I, § 23 which provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens”).

265. *Id.*

266. *Id.* at 1019-20 (citing *Collins v. Day*, 644 N.E.2d 72, 78-79 (Ind. 1994) (“First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. In other words, ‘there must be some inherent and substantial difference germane to the subject and purpose of the legislation [creating the distinction] between those included within the class and those excluded.’ Second, the preferential treatment accorded by the legislation must be uniformly applicable and equally available to all persons similarly situated.”) (alteration in original).

267. *Id.* at 1020.

268. *Id.* at 1021.

269. 820 N.E.2d 787 (Ind. Tax Ct. 2004).

270. *Id.* at 788.

271. *Id.*

272. *Id.*

273. *Id.* at 788-89.

274. *Id.* at 789.

275. *Id.* at 789-90.

Indiana Constitution.²⁷⁶ The State Board on the other hand argued that the REMCs had not proven that they are similarly situated to these IOUs and therefore were not entitled to file consolidated returns.²⁷⁷ The Tax Court said the question was not whether the REMCs should be treated as the IOUs were, but rather whether any public utility company may file a consolidated return in the first place.²⁷⁸ The Tax Court based its denial of the REMCs' request on the fact that Indiana Code section 6-1.1-8 is completely silent with respect to public utilities filing consolidated returns.²⁷⁹ The Tax Court also relied on the fact that the law pertaining to assessment of personal property generally does not allow for filing of consolidated returns.²⁸⁰

B. Sales and Use Tax

1. *Simon Aviation, Inc. v. Indiana Department of State Revenue*.²⁸¹—Simon initiated this action on March 6, 2000 appealing the Department's imposition of use tax on aircraft lease payments Simon made from 1993 to 1995.²⁸² Simon, an Indiana corporation, leased two aircraft which were primarily hangered in Indiana during the years at issue, but used for interstate travel.²⁸³ The Department issued a ruling in 1987 that the lease payments were not subject to the use tax because the aircraft were used primarily in interstate commerce (ruling DRS87-10).²⁸⁴ The Department then audited Simon in the early 1990s and determined the lease payments were subject to the use tax.²⁸⁵ Simon contested the ruling under Indiana Code section 6-8.1-3-3, arguing that the imposition was prohibited because it would retroactively increase its tax liability.²⁸⁶ The Department reversed its ruling in a June 2, 1992 Letter of Finding ("LOF"), and stated that the audit did not establish a change in Simon's situation that would warrant invalidating DRS87-10.²⁸⁷ The Department, in that same LOF also stated that if any change did occur, Simon was required to notify the Department and request a new ruling.²⁸⁸ In 1993, Simon consolidated and refinanced its aircraft leases and did not notify the Department.²⁸⁹ Then in 1994, the Department rescinded DRS87-10, effective on leases entered into after July

276. *Id.* at 790.

277. *Id.*

278. *Id.*

279. *Id.* at 791.

280. *Id.* at 791 n.6.

281. 805 N.E.2d 920 (Ind. Tax Ct. 2004).

282. *Id.* at 922, 924.

283. *Id.* at 922.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 922-23.

289. *Id.* at 923.

1, 1992, and in 1996 the Department determined that Simon owed use tax of approximately \$150,000 on its lease payments from 1993 to 1995.²⁹⁰ Simon claims that DRS87-10 and the 1992 LOF did not subject the lease payments to use tax, but merely stated that the matter must be reconsidered.²⁹¹ The Tax Court held that by not notifying the Department of the refinancing of the lease, Simon placed itself outside the parameters of both DRS87-10 and the 1992 LOF, and therefore Simon's lease payments did not fall within the non-taxable parameters of either ruling.²⁹² Simon also argued that the 1992 LOF was a retroactive change prohibited by Indiana Code section 6-8.1-3-3, and therefore it should not be liable for the use taxes.²⁹³ The Tax Court dismissed this argument as without merit because it found that the 1992 LOF did not change the Department's interpretation under DRS87-10, but merely stated that a change in specific factual circumstances may warrant a different ruling.²⁹⁴ Finally, Simon argued that the imposition of the use tax against the lease payments violated the Commerce Clause of the United States Constitution.²⁹⁵ The Tax Court held that the imposition of use tax in this situation did indeed violate the Commerce Clause.²⁹⁶ The Tax Court, in applying the test from *Complete Auto Transit, Inc. v. Brady*,²⁹⁷ found that the imposition discriminated against interstate commerce in favor of local commerce.²⁹⁸ The Tax Court found discrimination in the fact that Indiana's use tax resulted in a greater tax burden on aircraft purchased out-of-state than aircraft purchased in-state.²⁹⁹ The Tax Court declined to find the imposition unfairly apportioned, because Simon did not present evidence that they had paid any sales or use tax to another state.³⁰⁰

2. *Guardian Automotive Trim, Inc. v. Indiana Department of State Revenue*.³⁰¹—Guardian operates a manufacturing facility in Evansville, Indiana, at which it manufactures exterior automotive components.³⁰² Guardian initiated

290. *Id.* at 923-24.

291. *Id.* 925.

292. *Id.* 926.

293. *Id.*

294. *Id.* at 926-27.

295. *Id.* at 927 (citing U.S. CONST. art. I, § 8, cl. 3, which provides "that Congress shall have the power '[to] regulate Commerce . . . among the several States'") (alteration in original).

296. *Id.* at 927.

297. 430 U.S. 274, 279 (1977).

298. *Simon Aviation*, 805 N.E.2d at 927 (citing *Ind.-Ky. Elec. Corp. v. Ind. Dep't of State Revenue*, 598 N.E.2d 647, 656 (Ind. Tax Ct. 1992) (stating that a state tax "will survive a Commerce Clause challenge if the tax (1) is imposed on an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce in favor of local commerce, and (4) is fairly related to services the state provides").

299. *Id.* at 929.

300. *Id.* at 928.

301. 811 N.E.2d 979 (Ind. Tax Ct. 2004), *trans. denied*, 2005 Ind. LEXIS 162 (Ind. Feb. 24, 2005).

302. *Id.* at 980 (the automotive components manufactured include: grilles, headlamp, bezels,

this tax appeal on December 31, 1998 claiming that the Department erred in assessing use tax on Guardian's mask processing equipment.³⁰³ The masks themselves were used by Guardian to insure that certain coatings sprayed on plastic parts that Guardian manufactured were applied only on the appropriate sections of the parts.³⁰⁴ Guardian claimed that the equipment it used to clean these masks was exempt from the use tax under the "equipment exemption."³⁰⁵ The Tax Court stated that, in order to be entitled to the exemption, Guardian had to show it was engaged in production and that the mask processing equipment was integral and essential to that production.³⁰⁶ Guardian claimed that it was clearly engaged in production, and that the mask processing equipment was integral because without it, the production process could not be sustained.³⁰⁷ Guardian also claimed that the chemicals used in the mask processing were exempt under the "consumption exemption."³⁰⁸ The Department agreed that the masks were integral, but that the mask processing equipment was for maintenance and not integral to the production process.³⁰⁹ The Department secondarily argued that the mask processing was not integral because it halted production for a substantial period of time.³¹⁰ The Tax Court held that Guardian was entitled to the "equipment" and "consumption" exemptions.³¹¹ The Tax Court relied on the fact that the mask processing was performed in synchronization with the production process, and that without the masks being cleaned Guardian would only be able to produce a small number of parts.³¹² The Tax Court disposed of the Department's arguments by stating that the production process must be examined as a whole, and not broken down into parts. The Tax Court also found that the evidence showed that the time spent cleaning the masks was not substantial.³¹³

and other exterior components).

303. *Id.* at 982.

304. *Id.* at 981.

305. *Id.* at 982 (citing IND. CODE § 6-2.5-5-3(b) which provides: "[t]ransactions involving manufacturing machinery, tools, and equipment are exempt from [sales and use] tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property") (alteration in original).

306. *Id.* at 982-83.

307. *Id.* at 983.

308. *Id.* at 985 (citing IND. CODE § 6-2.5-5-5.1(b) which provides: "[t]ransactions involving tangible personal property are exempt from [sales and use] tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, [or] repairing") (alteration in original).

309. *Id.* at 984.

310. *Id.*

311. *Id.* at 984-85.

312. *Id.*

313. *Id.*

3. *Graham Creek Farms v. Indiana Department of State Revenue*.³¹⁴—Graham is a farm operation in Jennings County, and brought this original tax appeal on July 20, 2000 after the Department denied Graham’s claim for refund of sales and use taxes paid on certain purchases.³¹⁵ Graham farms almost 7000 acres of land, raising various crops as well as cows and turkeys.³¹⁶ Graham contended that several items purchased for use on the farm should have been exempt from sales and use tax under the exemptions for property used in agricultural production.³¹⁷ The Tax Court noted that Graham had to show that it was engaged in production, and also that the item at issue was directly used in the production process.³¹⁸ Graham first argued that the rain slickers it purchased for its employees to use in loading turkeys were exempt because “people will not stand outside in the rain.”³¹⁹ The Tax Court denied the exemption and agreed with the Department’s argument that the rain slickers were not necessary to prevent injury or prevent contamination of the turkeys, as is required for a purchase of safety clothing to be exempt.³²⁰ Graham next sought an exemption for replacement parts for a backhoe that it claimed was “exempt machinery”³²¹ because the backhoe was used to bury dead turkeys and move contaminated bedding from the starter house.³²² The Tax Court again agreed with the Department in denying the exemption.³²³ The Tax Court relied on evidence that although the backhoe was a convenient way to move the bedding and bury turkeys, the backhoe was only used to move the bedding after it was outside of the starter house.³²⁴ The Tax Court held that this evidence was insufficient to show that the backhoe was directly used during the production process, and therefore, because the backhoe was taxable, the repair parts were taxable.³²⁵ Graham next asserted that the waste it purchased for the turkey house bedding was exempt as an essential and integral part of the turkey raising process.³²⁶ The Tax Court found the waste purchases were exempt.³²⁷ The Department’s contention was that the waste was also used in Graham’s barnyard, but the Tax Court found the evidence that the waste was used solely as turkey bedding

314. 819 N.E.2d 151 (Ind. Tax Ct. 2004).

315. *Id.* at 154.

316. *Id.*

317. *Id.* at 155 (Specifically, Graham claimed the purchases were exempt under IND. CODE § 6-2.5-5-1 or § 6-2.5-5-2.).

318. *Id.* at 156.

319. *Id.*

320. *Id.* (citing IND. ADMIN. CODE tit. 45, r. 2.2-5-6(d)(11)).

321. *Id.* at 157 (citing IND. ADMIN. CODE tit. 45 r. 2.2-5-4(d)(9)).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 158.

material sufficient to allow the exemption.³²⁸ The Tax Court held that the tobacco barn in which Graham sought exemption was an integral and essential part of the production process of producing marketable tobacco, and thus allowed an exemption for the materials purchased to remodel the barn.³²⁹ The Tax Court, in finding the barn was used for more than storage, relied on evidence of special construction of the barn which allowed for proper drying of the tobacco.³³⁰ The Tax Court next held that purchases of rat bait, used to prevent rats from getting in the seed packages Graham stores, were not exempt because the bait was not used in the production process.³³¹ The Tax Court then held that materials purchased to maintain the grain leg³³² and the gravel purchased for a driveway leading to the grain leg were not exempt because no evidence was presented showing that these items were used in the grain drying process.³³³ The Tax Court, in holding that the purchases of gate and fencing supplies were exempt, found that these items were used to manage and confine Graham's cows, and not merely, as the Department argued, for partitioning land.³³⁴ Graham next sought an exemption for the purchase of the bush-hog power take-off shaft because the bush-hog itself was exempt equipment.³³⁵ The Department argued the bush-hog was not exempt machinery because it was used on the land when no crops were being planted and no production was taking place.³³⁶ The Tax Court held the purchase of the take-off shaft was exempt in part.³³⁷ The Tax Court said that Graham was entitled to an exemption only for the percentage of time the bush-hog was used for preparing fields for planting and pastures for feeding cattle, but held that Graham was not entitled to the exemption for the percentage of time it used the bush-hog to clear fields as required to participate in the Conservation Reserve Program ("CRP").³³⁸ The Tax Court then held that Graham was not entitled to an exemption on the purchases of certain maintenance tools that Graham did not prove were directly used in the direct production process.³³⁹ The Tax Court granted Graham an exemption for purchases of parts and supplies that it sufficiently demonstrated were used to replace parts on exempt machinery.³⁴⁰

328. *Id.*

329. *Id.* at 159.

330. *Id.* at 158.

331. *Id.* at 159.

332. *Id.* (explaining that "the grain leg is the portion of the grain-drying operation that lifts the grain to the top of the tower where it is cleaned both at the time it goes into the grain bin and then again out of the bin for transport").

333. *Id.* at 160.

334. *Id.* (citing IND. ADMIN. CODE tit. 45, r. 2.2-5-3(e)(3)).

335. *Id.* at 161.

336. *Id.*

337. *Id.*

338. *Id.* (stating "under the CRP, if Graham sets aside acreage, it receives governmental price support for the crops produced on the remaining acres").

339. *Id.* at 162.

340. *Id.* at 163.

The Tax Court denied an exemption for the rope used to tie down tarpaulins (“tarps”) to protect the hay Graham stores, because no evidence was provided that Graham used the hay in any of its production processes.³⁴¹ Graham next claimed that it was entitled to an exemption for the purchase of tarps used to cover its seeding machines. The Tax Court granted the exemption by finding that for production to occur the grain must be protected as it moves from storage to the fields.³⁴² Graham next asserted its purchase of a heavy duty extension cord used to run the portable grain auger should be exempt because the auger was occasionally used to remove grain from the storage pit if there was a problem.³⁴³ The Tax Court denied the exemption finding that Graham failed to show the auger was directly used in the grain production process.³⁴⁴ The Tax Court denied Graham’s claim for an exemption of purchases of cleaning chemicals used to clean parts of exempt equipment during the maintenance and repair of that equipment, but the Tax Court granted an exemption for the glass cleaner used to clean the windows of the combine.³⁴⁵ The Tax Court found the testimony sufficient to conclude that the glass cleaner was part of the soy bean production process because no further production could occur if the beans could not be safely harvested because of dirty combine windows.³⁴⁶

4. *Morton Buildings, Inc. v. Indiana Department of State Revenue.*³⁴⁷—Morton is an Illinois corporation licensed to do business in Indiana, and is engaged in the production, sale, and on-site erection of prefabricated timber-frame, metal sheathed warehouses and other buildings for agricultural and industrial use.³⁴⁸ Morton paid use taxes to the Department for all of the raw materials used in the manufacturing of its buildings.³⁴⁹ Morton requested a refund of these use taxes, and after the Department’s failure to refund such taxes, Morton initiated this tax appeal on December 10, 1998.³⁵⁰ Morton did not claim that the raw materials were exempt, but rather claimed that the use tax imposition statute did not apply to Morton’s activity.³⁵¹ Morton contended that the raw materials were not subject to tax because Indiana Code section 6-2.5-3-2 required that the property at issue be both acquired in a retail transaction and used in Indiana.³⁵² Morton then presented evidence that the raw materials were acquired

341. *Id.*

342. *Id.*

343. *Id.* at 164.

344. *Id.*

345. *Id.*

346. *Id.* at 164-65.

347. 819 N.E.2d 913 (Ind. Tax Ct. 2004), *trans. denied*, 2005 Ind. LEXIS 392 (Ind. Apr. 19, 2005).

348. *Id.* at 914.

349. *Id.*

350. *Id.* at 914-15.

351. *Id.* at 915.

352. *Id.* (citing IND. CODE § 6-2.5-3-2 which “establishes two conditions for the imposition of use tax on tangible personal property: 1. The ‘tangible personal property’ at issue must be

in a retail transaction in Illinois, but claimed that the materials were used in Morton's factories in Illinois to fabricate the building components.³⁵³ Morton argued that the building components had an identity separate and distinct from the raw materials, and therefore the raw materials were not used in Indiana, but rather only the building components were used in the State.³⁵⁴ The Department argued that the raw materials retained their original identity up until the point the finished product was completed.³⁵⁵ The Tax Court reversed the Department and held that the raw materials were used outside Indiana, and the materials used in Indiana (the building components) were not acquired in a retail transaction but instead were fabricated by Morton.³⁵⁶ The Tax Court used fabrication in the same context as the word is used in a manufacturing exemption regulation, and therefore found that in this case the transformation was sufficient to render the building materials different from the raw materials.³⁵⁷ The Tax Court declined to define the point during a process at which raw materials lose their original identity, and stated the question must be answered on a case-by-case basis.³⁵⁸ The Tax Court also acknowledged that Morton was simply taking advantage of a loophole in the use tax statute, but said that it was up to the General Assembly to correct the loophole.³⁵⁹

C. Corporate Income Tax

1. Southern Indiana Gas & Electric Co. ("SIGECO") v. Indiana Department of State Revenue.³⁶⁰—SIGECO initiated this action on January 7, 2002 appealing the Department's determination that SIGECO should include its sales of natural gas to out-of-state purchasers in computing the fraction of its business income to be apportioned to Indiana.³⁶¹ SIGECO is an Indiana Corporation with its

'stor[ed], use[d], or consum[ed] in Indiana;' and, 2. The 'tangible personal property' at issue must have been "acquired in a retail transaction").

353. *Id.* at 915-16.

354. *Id.* at 916.

355. *Id.*

356. *Id.* at 917.

357. *Id.* at 916 (citing IND. ADMIN. CODE tit. 45, r. 2.2-5-8(k) which provides: "Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property is performance as a business of an integrated series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change, and it must result in a transformation of property into a different product having a distinctive name, character, and use. Operations such as compounding, fabricating, or assembling are illustrative of the types of operations which may qualify under this definition").

358. *Id.* at 917.

359. *Id.* at 917-18.

360. 804 N.E.2d 877 (Ind. Tax Ct. 2004), *trans. denied*, 2004 Ind. LEXIS 659 (Ind. July 23, 2004).

361. *Id.* at 878.

principal place of business in Evansville.³⁶² SIGECO was in the business of purchasing natural gas from producers in Louisiana, Texas, and Illinois, and then, transporting the gas to SIGECO customers located outside of Indiana.³⁶³ The gas was transported in interstate pipelines, which operated as common carriers under the Federal Energy Regulatory Commission.³⁶⁴ SIGECO would take delivery and ownership of the gas at some point in the pipeline and then it would make arrangements to ship the natural gas to its customers.³⁶⁵ The Department claimed that SIGECO should include these sales in the numerator of its sales factor for the apportionment formula based on the Department's rule at Indiana Administrative Code title 45, rule 3.1-1-1-53(6).³⁶⁶ This rule states that "where the following conditions have been met: a) a taxpayer whose salesman operated from an office located in Indiana; b) makes a sale to a purchaser in another state in which the taxpayer is not taxable; c) the property is shipped directly by a third party to the purchaser" and also, the sales are not taxable in the state of delivery, then the sale will be attributed to Indiana.³⁶⁷ The Department and SIGECO only disagreed as to the application of condition (c) from above.³⁶⁸ SIGECO argued that when they took ownership of the gas, they failed to fall under condition (c), because a third party did not deliver the gas directly to the customer.³⁶⁹ The Department argued that because "third party" was not defined, the pipeline (as a common carrier) could be considered a "third party," therefore subjecting SIGECO's sales to inclusion in the numerator of their sales factor.³⁷⁰ The Tax Court reversed the Department, and held that the plain meaning of "third party" as "a person other than the principals" did not allow for the Department's interpretation.³⁷¹ The Tax Court secondarily held that the pipelines were "carriers" and not "shippers" which also leads to a conclusion that these sales do not meet the condition above.³⁷²

2. *Aztar Indiana Gaming Corp. v. Indiana Department of State Revenue*.³⁷³—Aztar initiated a tax appeal on July 28, 2000, contending that the

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 881 n.5 ("The Department contends that under Indiana Code [section] 6-3-2-2(I) it has the administrative authority [when] . . . 'the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana . . . [to] require, in respect to all or any part of the taxpayer's business activity if reasonable . . . the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.'").

367. *Id.* at 881 (quoting IND. ADMIN. CODE tit. 45, r. 3.1-1-53(6)).

368. *Id.*

369. *Id.*

370. *Id.* at 882.

371. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2378 (1981)).

372. *Id.* (citing BLACK'S LAW DICTIONARY 513 (7th ed. 1999) for the definition of "shipper").

373. 806 N.E.2d 381 (Ind. Tax Ct. 2004), *trans. denied*, 2004 Ind. LEXIS 907 (Ind. Sept. 28,

Department erred in holding that Aztar must “add-back” its deduction for Indiana’s Riverboat Wagering Tax (“RWT”) in calculating Aztar’s Indiana Adjusted Gross Income (“AGI”).³⁷⁴ Aztar claimed that the RWT was an excise tax and not a tax “based on or measured by income,” and therefore Aztar should not have to add back the RWT.³⁷⁵ Aztar supported its claim by citing instances in the Department’s regulations and the Indiana Code where the RWT was unambiguously labeled a “Wagering Tax.”³⁷⁶ The Tax Court discussed the precedent on excise taxes, where the Indiana Supreme Court recognized that a tax on a privilege is an excise tax, but that an excise tax could be a tax measured by income.³⁷⁷ The Tax Court held that the RWT was an excise tax, but that because it was clearly “measured by the taxpayer’s income” the RWT liability is subject to the add-back provisions of Indiana’s AGI.³⁷⁸

3. *Norrell Services, Inc. v. Indiana Department of State Revenue*.³⁷⁹—Norrell was a Georgia corporation with its principal office in Atlanta, Georgia.³⁸⁰ Norrell, under franchise agreements, provided temporary employee services to franchisees in Indiana during the late 1970s.³⁸¹ The franchisees, under the agreements, paid fees to Norrell for “franchise and license granted [by Norrell] in the Agreement, for payroll and billing services[,] and for financing of receivables.”³⁸² In 1982, the Department audited Norrell and informed the company that it was liable for gross income tax on the franchise fees.³⁸³ Then, in 1984, the Department issued a Letter of Findings (“LOF”)³⁸⁴ determining that Norrell was not liable for gross income tax on the fees.³⁸⁵ In 1998, the Department issued another LOF³⁸⁶ in which it determined that Norrell was liable for the portion of the fees paid for employees’ wages and royalty fees.³⁸⁷ Norrell initiated this appeal on April 1, 1999 and filed a motion for summary judgment claiming that the Department’s position represented a “change of interpretation”

2004).

374. *Id.* at 382.

375. *Id.* (citing IND. CODE § 6-3-1-3.5(b)(3)).

376. *Id.* at 384 (specifically citing IND. CODE § 4-33-13-1 to -6).

377. *Id.* at 384-85 (citing *Ind. Dep’t of State Revenue v. Fort Wayne Nat’l Corp.*, 649 N.E.2d 109, 111 (Ind. 1995) (holding that “an excise . . . tax may be measured by a taxpayer’s income without being construed as an income tax”)).

378. *Id.*

379. 816 N.E.2d 517 (Ind. Tax Ct. 2004), *trans. denied*, 2005 Ind. LEXIS 383 (Ind. Apr. 14, 2005).

380. *Id.* at 518.

381. *Id.*

382. *Id.* (alterations in original).

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 519.

in the imposition of the gross income tax,³⁸⁸ which is prohibited by Indiana Code section 6-8.1-3-3³⁸⁹ as cited from the years at issue.³⁹⁰ The Tax Court granted Norrell's summary judgment motion holding that absent a modification in the agreements, or a change in the governing regulations, the Department's alteration of its interpretation was improper.³⁹¹

*D. Individual Income Tax: Buckner v. Indiana Department of State Revenue*³⁹²

Buckner, an Indiana resident, received a W-2 from his employer Banc One Management, indicating wages of approximately \$32,000.³⁹³ On his 2001 individual income tax return, Buckner claimed zero income and requested a refund of approximately \$1400.³⁹⁴ The Department denied the refund, and Buckner initiated this action on November 1, 2002, appealing the Department's ruling.³⁹⁵ Buckner made a "section 861" argument claiming that the source of his income was: (1) outside the United States; (2) was not listed in section 1.861; 3) was not "gross income"; and therefore, was not taxable.³⁹⁶ The Tax Court granted the Department's motion for summary judgment, and held that "section 861 arguments" had been uniformly rejected, and stated although the Tax Court was not bound by those decisions, the Tax Court found them persuasive in this instance.³⁹⁷ The Tax Court also relied on a U.S. Tax Court decision that found that the source rules in 1.861 do not exclude from U.S. taxation income earned by U.S. citizens from sources within the United States.³⁹⁸

388. *Id.*

389. *Id.* (citing IND. CODE § 6-8.1-3-3(b) (1994) which provided that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is [a]dopted in a rule under this section . . . if the change would increase a taxpayer's liability for a listed tax") (alteration in original).

390. *Id.* at 519.

391. *Id.* at 520.

392. 804 N.E.2d 314 (Ind. Tax Ct. 2004).

393. *Id.*

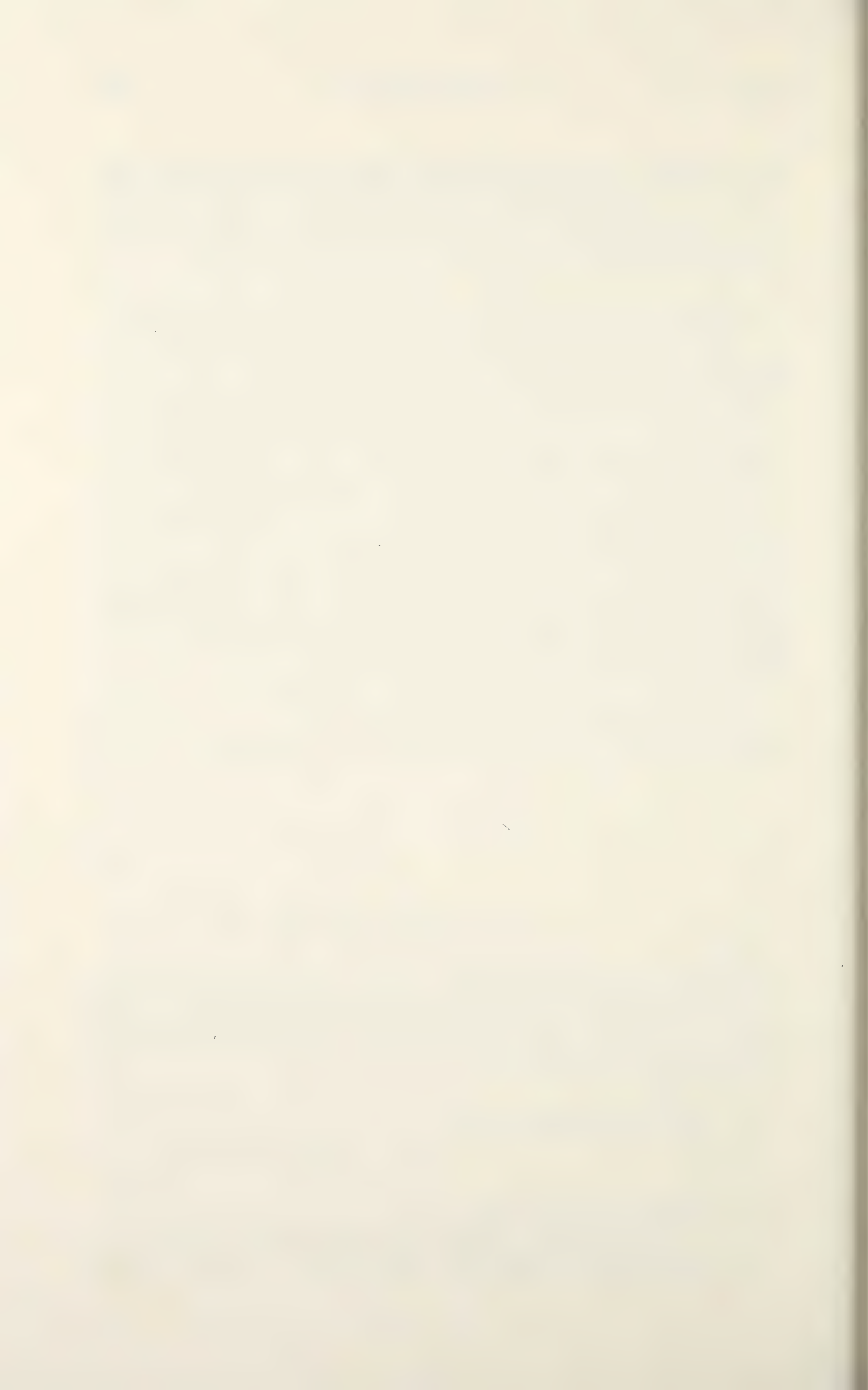
394. *Id.*

395. *Id.* at 315.

396. *Id.* (citing 26 C.F.R. § 1.861-8(f)(1)).

397. *Id.* (citing *United States v. Bell*, 238 F. Supp. 2d 696, 701 (M.D. Pa. 2003)).

398. *Id.* (citing *Takaba v. Comm'r*, 119 T.C. 285, 295 (2002)).



RECENT DEVELOPMENTS IN INDIANA TORT LAW

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This Article discusses significant developments in tort law in Indiana during the survey period. In light of the breadth of the subject area, this Article is neither comprehensive nor exhaustive. This Article does not attempt to address in detail all of the cases applying tort law in Indiana during the survey period, but attempts to address selected cases in which the courts have interpreted the law or clarified existing law.

I. NEGLIGENCE

A. Duty of Care

Two cases during the survey period addressed the duty of care in somewhat novel factual circumstances worthy of the practitioner's attention. In the first, *Geiersbach v. Frieje*,¹ the Indiana Court of Appeals clarified the standard of care for university sporting events and practices. In the second, *Williams v. Cingular Wireless*,² the court addressed the duty owed by a wireless telephone provider when the telephone it sold was in use at the time of a motor vehicle accident.

1. *University Athletics*.—In *Geiersbach*, a university baseball player filed suit against the university, the head coach for the team, a volunteer coach (the head coach's son), and another player on the team for personal injuries sustained during practice. The drill used during practice inadvertently caused two baseballs to be in play at once and, while the plaintiff watched and prepared to deal with the first, he was struck in the eye by the second, causing severe and permanent damage to his eye.³ Defendants' motion for summary judgment was granted. On appeal, the plaintiff argued there was a genuine issue of material fact as to whether the parties had breached a duty owed to him, relying upon cases in which high school personnel were held to have a duty to exercise ordinary and reasonable care for the safety of high school students under their authority when a child was injured during a sports practice.⁴ In the high school cases, the supreme court extended a rule previously adopted for elementary school students to apply to secondary school students.⁵

While the *Geiersbach* plaintiff recognized that the rationale of these cases

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1. 807 N.E.2d 114 (Ind. Ct. App. 2004).

2. 809 N.E.2d 473 (Ind. Ct. App. 2004).

3. *Geiersbach*, 807 N.E.2d at 115-16.

4. *Id.* at 116 (citing *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552 (Ind. 1987)).

5. *Id.* (citing *Norman v. Turkey Run Cmty. Sch. Corp.*, 411 N.E.2d 614, 616 (Ind. 1980); *Miller v. Griesel*, 308 N.E.2d 701, 707 (Ind. 1974)).

did not readily transfer to the college setting, he argued that “a trend is developing among courts to find a ‘special’ relationship between colleges or universities and their student-athletes.”⁶ No Indiana court had considered this question, and the court disagreed with the student that the reasonable care standard should apply to the university. Instead, because athletes choose to participate in sports which, “by their nature, involve a certain amount of inherent danger,” the court held that “the proper standard of care for sporting events and practices should be to avoid reckless or malicious behavior or intentional injury.”⁷

The court noted that “caselaw creates a clear distinction between dangers which are inherent in the activity and those which are not.”⁸ While some of the caselaw⁹ used misleading language of “incurred risk” and “assumption of risk,” it is more appropriate to resolve issues by merely determining whether the risks are inherent in the sport.¹⁰ This avoids the confusion as to what extent incurred risk was actually subsumed by comparative fault.¹¹

The court also addressed arguments presented by the parties as to the question of whether a co-participant is liable for an accidental injury during a sporting event. Noting that the *Mark* court had held that a participant does not have a duty to fellow participants to refrain from conduct which is inherent and foreseeable in the play of the game even though such conduct may be negligent, the court expressly expanded *Mark* to “include all participants in the sporting event,” expressly stating this expands to players participating in the event, coaches, and even to players who are sitting on the bench.¹² As dangers are inherent in the game, a participant should not be able to recover from a player, team, or stadium without proving recklessness or that the injury was somehow intentional.¹³

2. *Wireless Telephones*.—In the second case addressing duty, *Williams v. Cingular Wireless*,¹⁴ the plaintiff motorist brought an action against Cingular, a cellular telephone company, alleging that the company negligently furnished a cellular phone to a customer who it knew or should have known would use the phone while operating a motor vehicle.¹⁵ The cellular customer was in fact alleged to have been driving and using the phone at the time the customer’s vehicle collided with the plaintiff’s vehicle.¹⁶ The complaint was dismissed for

6. *Id.* at 117.

7. *Id.* at 118.

8. *Id.* at 119.

9. *Id.* at 118-19 (citing *Gyuriak v. Millice*, 775 N.E.2d 391 (Ind. Ct. App. 2002); *Mark v. Moser*, 746 N.E.2d 410 (Ind. Ct. App. 2001)).

10. *Id.* at 119.

11. *Id.* at 119-20.

12. *Id.* at 120.

13. *Id.*

14. 809 N.E.2d 473 (Ind. Ct. App. 2004).

15. *Id.* at 475.

16. *Id.*

failure to state a claim, and the plaintiff appealed.

Addressing whether Cingular owed a duty to the plaintiff, the court looked to the three factors required to impose a duty at common law: “(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.”¹⁷ As to the first, the court found no evidence of a relationship in the record.¹⁸ There was no contract between Cingular and the plaintiff, the accident did not involve a Cingular employee or vehicle and did not occur on Cingular property, and the cellular phone did not malfunction and cause the injury.¹⁹

The court next considered the question of foreseeability. Although agreeing that it might be foreseeable that a person who is using a cellular phone while driving might be in an accident, it was too great a “leap in logic” to make it likewise foreseeable to a legally sufficient extent that the sale of the phone would result in an accident.²⁰ It is the driver’s inattention while using the phone, not the sale of the phone, that may cause an accident.²¹ Finally, the court considered public policy, noting that “[d]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of public policy which lead the law to say that the plaintiff is entitled to protection.”²² After reviewing the many beneficial uses of cellular phones and the potential that imposing a duty here might “effectively require” companies to stop selling phones entirely because they would have no way of preventing customers from using the phones while driving, the court concluded “sound public policy dictates that the responsibility for negligent driving should fall on the driver.”²³ Balancing these factors, the court concluded that Cingular did not owe a duty to the plaintiff and affirmed the dismissal.²⁴

B. Impact Rule

In *Ritchhart v. Indianapolis Public Schools*,²⁵ the court of appeals considered the requirements of the impact rule for a claim of negligent infliction of emotional distress. Prior to 1991, Indiana courts adhered to the impact rule in claims for negligent infliction of emotional distress.²⁶ In 1991, the Indiana Supreme Court in *Shuamber v. Henderson*²⁷ relaxed the rule, and several cases

17. *Id.* at 476 (citing *N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 466 (Ind. 2003)).

18. *Id.* at 477.

19. *Id.*

20. *Id.* at 478.

21. *Id.*

22. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991)).

23. *Id.* at 479.

24. *Id.*

25. 812 N.E.2d 189 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004).

26. *Id.* at 192.

27. 579 N.E.2d 452, 454 (Ind. 1991).

since have explored its parameters.²⁸ In *Ritchhart*, the plaintiff was the mother of a three-year-old boy who suffered from severe disabilities. The child attended the Indiana School for the Blind. The bus driver misidentified the child, attempted to deliver him to the wrong home and, finding no one there, left him with a neighbor. When the child was not delivered home as scheduled, the mother contacted the school and the police. It was several hours later before the child was found and, after a visit to Riley Children's Hospital, was determined to have been unharmed. The mother filed suit for negligent infliction of emotional distress. IPS sought summary judgment, claiming among other things that there was no direct impact on the mother.

Considering the development of negligent infliction of emotional distress, the court discussed *Groves v. Taylor*,²⁹ in which the supreme court created a new class of potential plaintiffs—"relative bystanders."³⁰ In such cases where the plaintiff can show a "sufficient direct involvement," a physical impact is not required.³¹ *Groves* sets out a three-part test: (1) the plaintiff witnesses an injury that is either fatal or so serious that it could be expected to cause severe distress to the bystander; (2) the plaintiff and the primary victim have a close family relationship that is "analogous" to a spouse, parent, child, grandparent, grandchild, or sibling; and (3) the plaintiff witnesses the accident or the gruesome aftermath minutes after it occurs.³² The *Groves* court specifically contrasted those cases falling within this test and non-compensable cases where the plaintiff learns of a loved one's death or serious injury by indirect means.³³ The court noted that the relative bystander case has been applied only once in Indiana in *Blackwell v. Dykes Funeral Homes, Inc.*,³⁴ a case where the parents of the deceased were found to be sufficiently and directly involved in an incident where a funeral home lost the remains of their son.

Applying the three-part test of *Groves*, the *Ritchhart* court concluded that the plaintiff met only the second part of the test, having a close family relationship.³⁵ She failed to satisfy either the first or third parts since the child was not physically injured and she did not witness any part of the incident giving rise to her complaint. Instead, the court said, this incident was more akin to the "non-compensable 'experience of learning of a loved one's death or severe injury by indirect means.'"³⁶

28. *Ritchhart*, 812 N.E.2d at 193-94.

29. 729 N.E.2d 569 (Ind. 2000).

30. *Id.* at 572-73.

31. *Id.* at 573.

32. *Id.*

33. *Id.*

34. 771 N.E.2d 692 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 38 (Ind. 2003).

35. *Ritchhart*, 812 N.E.2d at 195.

36. *Id.* at 196 (quoting *Groves*, 729 N.E.2d at 573).

II. LEGAL MALPRACTICE

A. Statute of Limitations

In *Estate of Spry v. Batey*,³⁷ the Indiana Court of Appeals applied the two-year statute of limitations and the “discovery rule” in the context of a legal malpractice claim. The court of appeals affirmed the trial court’s grant of summary judgment to Ruth A. Batey and Gold & Polansky, Chartered (collectively “the Firm”) on grounds that the Estate’s legal malpractice claim against the Firm was barred by the statute of limitations.³⁸ The claim arose out of a car accident in which Kelly Spry, a passenger in a car driven by John W. Taylor, was killed after leaving the Leiters Ford Tavern. The Estate, represented by the Firm, settled with Taylor’s insurer on May 11, 1999 and signed a general release. Pursuant to the release, the Estate released “JOHN W. TAYLOR, JR. and any other person, firm or corporation charged or chargeable with responsibility or liability” in connection with the accident.³⁹

In August 1999, the Estate hired a new attorney and filed a claim against the Leiters Ford Tavern and its owners. The tavern then demanded that the Estate dismiss the claim because the release signed by the Estate had also released any claim against the tavern. On June 1, 2000, the Estate’s new attorney sent a letter to Batey advising her of the tavern’s demand, indicating that the Estate’s attorneys agreed that the release also released the claim against the tavern, and asking Batey to contact them or have her attorney or insurer contact them to discuss the matter. The Firm disputed that the release extended to the tavern, and the Estate continued to litigate against the tavern. On November 13, 2000, the trial court granted summary judgment for the tavern based on the release.⁴⁰

On September 5, 2002, the Estate filed a complaint against the Firm alleging legal malpractice for failure to provide competent advice with respect to the release. In granting summary judgment, the trial court found the Estate “knew or should have known of its claim on June 1, 2000, when its attorney sent a letter to [the Firm] advising them to put their attorney and insurance carrier on notice.”⁴¹

As the court of appeals described, the applicable statute of limitations for legal malpractice is two years⁴² and is subject to the “discovery rule.”⁴³ Accordingly, the statute does not begin to run until the plaintiff knows, or in the exercise of ordinary diligence could have known, that he had sustained an injury as the result of the tortious act of another.⁴⁴ However, it is not necessary that the

37. 804 N.E.2d 250 (Ind. Ct. App. 2004).

38. *Id.* at 254.

39. *Id.* at 251.

40. *Id.* at 251-52.

41. *Id.* at 252.

42. *Id.* (citing IND. CODE § 34-11-2-4 (1998)).

43. *Id.* at 253.

44. *Id.*

full extent of damages be known or ascertainable, as long as some ascertainable damage has occurred.⁴⁵

In rejecting the Estate's argument that the statute did not begin to run until November 2002 when the trial court granted summary judgment for the Firm, the court observed that the "Estate's argument confuses the distinction between the occurrence of damage and the amount of damage."⁴⁶ The court then noted that the injury and damage actually occurred in May 1999 when the Firm advised the Estate to sign the release.⁴⁷ The Estate discovered that it had sustained an injury as a result of the Firm's tortious conduct at least by June 1, 2000 when the Estate's new lawyer sent the letter to the Firm putting it on notice of the issue with the release.⁴⁸

B. Assignment of Legal Malpractice Claim

In *Rosby Corp. v. Townsend, Yosha, Cline & Price*,⁴⁹ the court clarified that any assignment of a legal malpractice claim is void as contrary to public policy, regardless of whether the intended assignee is an adversary. The *Rosby* case arose out of a suit filed by Monon Corporation against its attorneys in 1992. Monon, which had filed for bankruptcy and entered into a settlement agreement with creditors, purported to assign a legal malpractice claim to Rosby, its creditor. In July 2002, Monon moved to substitute Rosby as the party in interest. The trial court granted the attorneys' motion for summary judgment on grounds that Monon's attempted assignment of the legal malpractice claim to Rosby was contrary to law.⁵⁰

As noted by the *Rosby* court, in *Picadilly, Inc. v. Raikos*, the Indiana Supreme Court held that "legal malpractice claims are not assignable."⁵¹ In *Picadilly*, appellant's bar was sued by Charles Colvin, who was injured in an accident caused by a patron of the bar. Colvin recovered \$75,000 in compensatory damages and \$150,000 in punitive damages. The bar then sued its attorneys for alleged malpractice relating to an erroneous instruction on punitive damages, and the attorneys were granted summary judgment. The bar then filed bankruptcy, and as part of its reorganization plan, the punitive damages were discharged. However, Colvin was assigned the malpractice claim against the bar's attorneys. Colvin appealed the grant of summary judgment for the attorneys, which the supreme court reversed.⁵²

In affirming the trial court's grant of summary judgment for the attorneys, the court of appeals rejected Rosby's argument that *Picadilly* was limited to an

45. *Id.* at 252-53.

46. *Id.* at 254.

47. *Id.*

48. *Id.*

49. 800 N.E.2d 661 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 801 (Ind. 2004).

50. *Id.* at 663.

51. *Id.* at 665 (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 339 (Ind. 1991)).

52. *Id.* (citing *Picadilly*, 582 N.E.2d at 339).

assignment of a malpractice claim to an adversary in the underlying action. The court held that “*Picadilly* represents a bright-line rule drawn by the supreme court holding that no legal malpractice claims may be assigned, regardless whether they are assigned to an adversary.”⁵³ The court of appeals noted that the *Picadilly* court discussed the implications of a role reversal in the event of an assignment to an adversary, but it found no indication that the holding in *Picadilly* was limited to such facts.⁵⁴ Rather, the court of appeals concluded that the *Picadilly* court was concerned with any assignments of legal malpractice claims. The court noted that allowing such assignments would lead to the “treatment of such claims as a commodity,” which would “denigrate the unique fiduciary relationship that exists between a client and an attorney.”⁵⁵ The court of appeals explained that the attorney-client relationship could be harmed by weakening the attorney’s loyalty to a client and by threatening the duty to maintain client confidences.⁵⁶

III. ACCOUNTANT MALPRACTICE

The court of appeals interpreted the statutory accountant-client privilege in *Orban v. Krull*.⁵⁷ In that case, Dana Krull performed accounting services for Richard and Janet Orban personally and for a business owned by Richard and another partner. After the partner advised Krull that he believed Richard was stealing from the business, the Indiana Department of Revenue sent Krull a subpoena seeking the Orbans’ accounting information. Krull released the information, and criminal charges were filed against the Orbans. Although the claims were ultimately dismissed, the Orbans filed suit against Krull for accountant malpractice and tortious interference with contract. The trial court granted Krull’s motion for summary judgment.⁵⁸

In reversing the judgment for the accountant, the court relied on the statutory accountant-client privilege, which unambiguously states “[t]he information derived from or as the result of professional services is confidential and privileged.”⁵⁹ Because the information disclosed was obtained as a result of Krull’s professional services, Krull had a duty to keep it confidential unless he had the Orbans’ consent or was ordered by a court to produce the information. The court noted that under Indiana Code section 25-2.1-14-1, an accountant is not required to divulge information acquired in connection with his services as an accountant, so Krull could have properly refused to comply with the subpoena.⁶⁰ The court also rejected Krull’s argument that the Orbans waived the privilege by

53. *Id.*

54. *Id.* at 666.

55. *Id.* at 665-66.

56. *Id.* at 666 (citing *Picadilly*, 582 N.E.2d at 342-43).

57. 805 N.E.2d 450 (Ind. Ct. App. 2004).

58. *Id.* at 453.

59. *Id.* at 453-54 (citing IND. CODE § 25-2.1-14-2).

60. *Id.* at 454.

checking the box on their tax returns that authorized “*the Department* to discuss my return with my tax preparer.”⁶¹ This did not authorize the accountant to release information to the Department.

IV. MEDICAL MALPRACTICE

A. No Cause of Action for Death of a Fetus

In *Breece v. Lugo*, the court of appeals held that there is no cause of action under the Medical Malpractice Act for the wrongful death of a fetus.⁶² In that case, James and Geneva Breece brought suit individually and on behalf of their deceased daughter after Geneva had an emergency caesarian section that resulted in the delivery of one healthy baby and one deceased fetus. Because Indiana does not recognize a cause of action for the wrongful death of a fetus under the Child Wrongful Death Act,⁶³ the plaintiffs stressed that their claim was under the Medical Malpractice Act.

In rejecting the plaintiffs’ claim that the Act created a cause of action, the court emphasized that the Medical Malpractice Act did not create a new class of plaintiffs nor did it increase the scope of damages that can be sought against healthcare providers.⁶⁴ Indeed, “the obvious purpose of the act was to protect health care providers from malpractice claims, . . . not to create new and additional causes of actions.”⁶⁵

However, the court reversed the trial court’s grant of summary judgment in favor of the health care providers on the issue of the mother’s recovery of damages for negligent infliction of emotional distress associated with the death of the fetus.⁶⁶ The court observed that in the *Bolin* case, in which the supreme court held that there is no recovery for the wrongful death of a fetus under the Child Wrongful Death Act, the supreme court noted that its conclusion “does not mean that negligently injured expectant mothers have no recourse.”⁶⁷

B. No Private Cause of Action Under Statute Imposing Duty on Hospital Staff to Review Practices

In *Roberts v. Sankey*, the court of appeals held that Indiana Code section 16-21-2-7, which imposes a duty on hospital staff to review the professional practices at the hospital, does not create a private cause of action for medical

61. *Id.*

62. 800 N.E.2d 224 (Ind. Ct. App. 2003), *reh’g denied* (Ind. Ct. App. 2004).

63. *See Bolin v. Wingert*, 764 N.E.2d 201, 207 (Ind. 2002).

64. *Breece*, 800 N.E.2d at 228-29.

65. *Id.* at 227 (citing *Warrick Hosp., Inc. v. Wallace*, 435 N.E.2d 263 (Ind. Ct. App. 1982), *rev’d in part and affirmed in part*, *Cmty. Hosp. of Anderson & Madison County v. McKnight*, 493 N.E.2d 775, 777 (Ind. 1986)).

66. *Id.* at 230.

67. *Id.* at 229 (citing *Bolin*, 764 N.E.2d 201 at 207).

malpractice.⁶⁸ In that case, the personal representative of Nell Roberts's estate brought a medical malpractice action against the hospital's pathologist and others. Roberts was a patient at Vermillion County Hospital during the time period in which the death rate in the four-bed intensive care unit had increased dramatically. Subsequently, Orville Lynn Majors, a licensed practical nurse who was on duty when 121 of 147 such patients died, was convicted of the murder of six of those patients. Roberts's estate brought a claim against Dr. Sankey, a pathologist and member of the hospital staff. In affirming summary judgment for Dr. Sankey, the court observed that a physician-patient relationship is necessary in order to bring a malpractice action.⁶⁹ Here, it was undisputed that Dr. Sankey had no such relationship with Roberts.⁷⁰

The court rejected the estate's argument that Indiana Code section 16-21-2-7 created a duty in the absence of a physician-patient relationship. The court noted the general rule that "a private party may not enforce rights under a statute designed to protect the public in general and containing a comprehensive enforcement mechanism."⁷¹ The court found that the statutory scheme contained such an enforcement mechanism for monitoring compliance with the hospital licensure requirements for the protection of hospital patients.⁷² The court found no apparent legislative intent to authorize a private right of action.⁷³

C. "Qualified Healthcare Provider" and Failure to File Assumed Name

In *Schriber v. Anonymous*, the court of appeals held, as a matter of first impression, that a corporation which did not file a certificate of assumed name was not a "qualified healthcare provider" under the Act.⁷⁴ In that case, at the time of the incident in question, the nursing home conducted business and was licensed under one assumed name (Eagle Care Healthcare), was listed in the Department of Insurance records as a qualified health care provider under a different assumed name (Eagle Valley Meadows), but failed to file a certificate of assumed name pursuant to Indiana Code section 23-15-1-1. As a result, the court reversed the trial court's dismissal of the complaint for lack of subject matter jurisdiction because "Eagle Valley Meadows" not "Eagle Care Healthcare" was a qualified health care provider.⁷⁵

The court noted that the purpose of the filing requirement under Indiana Code section 23-15-1-1 is to "provide information to litigants and others as to the true party in interest when . . . business is done [under] an assumed name."⁷⁶

68. 813 N.E.2d 1195, 1199 (Ind. Ct. App. 2004).

69. *Id.* at 1197.

70. *Id.* at 1196-98.

71. *Id.* at 1198 (citing *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1260 (Ind. 2000)).

72. *Id.* at 1199.

73. *Id.*

74. 810 N.E.2d 1119, 1125 (Ind. Ct. App. 2004).

75. *Id.*

76. *Id.* at 1124 (citing *Aronson v. Price*, 644 N.E.2d 864, 868 (Ind. 1994)).

Generally, without strict compliance with the filing requirements, a party doing business with such a corporation cannot be charged with constructive notice of that corporation's use of an assumed name.⁷⁷ Here, because EagleCare failed to file an assumed business name, the plaintiff was not charged with constructive knowledge of its use of the name "Eagle Valley Meadows."

D. Collateral Estoppel

In *Infectious Disease of Indianapolis v. Toney, P.S.C.*, the court of appeals held that where a patient settled with another health care provider and received her full damages resulting from the claimed injury, she was collaterally estopped from collecting additional damages.⁷⁸ The case arose out of a spinal fusion surgery that Toney underwent at Orthopaedics Indianapolis. After the surgery, Toney developed an infection which worsened, and Toney underwent emergency debridement surgery. Dr. Douglas Webb of Infectious Disease of Indianapolis then became involved in Toney's treatment. In her complaint, Toney alleged that Orthopaedics was negligent in treating her wound infection, and its negligence necessitated another surgery and intravenous antibiotics. Toney also alleged Dr. Webb negligently treated her wound infection and was allegedly harmed by Dr. Webb's improper administration of antibiotics. Toney settled with Orthopaedics for \$100,000 and proceeded against the Patient's Compensation Fund for additional damages.⁷⁹ Toney presented evidence of all of her injuries, which the court noted was appropriate since an original tortfeasor is responsible for all damages flowing from its negligence.⁸⁰ The trial court found Toney's total damages amounted to \$725,000, which was less than the applicable medical malpractice cap.⁸¹

The court of appeals noted that "Toney had a full and fair opportunity to litigate her total damages arising from Orthopaedics' malpractice, which included the injuries she suffered as a result of Dr. Webb's alleged malpractice."⁸² Thus, the court found an identity of issues as to damages and determined collateral estoppel barred any additional recovery for the same damages.⁸³

Interestingly, although holding that Toney was precluded from recovering additional damages, the court concluded that Toney was not precluded from attempting to establish that Dr. Webb was liable for malpractice.⁸⁴ As such, the court recognized that notwithstanding the absence of any financial incentive, an injured plaintiff may desire to prove she has been wronged by another "to

77. *Id.*

78. 813 N.E.2d 1223, 1231 (Ind. Ct. App. 2004).

79. *Id.* at 1225-26.

80. *Id.* at 1231.

81. *Id.* at 1226.

82. *Id.* at 1231.

83. *Id.*

84. *Id.*

achieve a catharsis of sorts.”⁸⁵

E. Single Occurrence with Injuries to Multiple Patients

In *McCarty v. Sanders*, the court of appeals addressed several cases consolidated by the trial court in which it was alleged that a single occurrence of malpractice resulted in injuries to more than one victim.⁸⁶ The *Sanders* case involved alleged malpractice in the delivery of twins: one twin died and the other suffered brain damage. The mother also suffered various injuries. In the *Koehl* case, the plaintiffs alleged malpractice in the administration of thyroid treatments to Carla Koehl while she was pregnant with twins, which resulted in injuries to the twins. In *Thomas*, a nurse anesthetist negligently administered an epidural injection, resulting in the death of Kerry Thomas and injuries to her child who was delivered by caesarian section. In each of these three cases, the health care providers paid the equivalent of the maximum amount under the Medical Malpractice Act of \$100,000 for a single occurrence of malpractice. The individual claimants then made claims against the Patient’s Compensation Fund (“the Fund”) for damages in excess of the statutory cap paid by the health care providers. In asserting claims against the Fund, each individual made a separate claim under a separate cap.⁸⁷ The Commissioner of the Indiana Department of Insurance argued that settlement payments of the \$100,000 statutory cap should be made by the health care providers to each of the injured parties before they could seek excess damages from the Fund.⁸⁸

The court of appeals held that a separate statutory cap on recovery from the Fund applies to each patient injured by a single occurrence of malpractice, but that health care providers are only required to pay \$100,000 for each occurrence.⁸⁹ The court based its decision on the plain meaning of the statute.⁹⁰ At the relevant time, Indiana Code section 34-18-14-3(a), unambiguously limited recovery for an “injury or death of a patient” to \$750,000, and subsection (b) limited the amount a provider must pay for “an occurrence of malpractice” to \$100,000. The court noted that the “occurrence” is the act of malpractice itself, and not the claimed injury.⁹¹ The court also noted that as so interpreted, “the statute achieves the twin goals of compensating those injured by malpractice and at the same time assuring that malpractice insurance will be available to health care providers.”⁹²

85. *Id.*

86. 805 N.E.2d 894 (Ind. Ct. App. 2004).

87. *Id.* at 896-97.

88. *Id.* at 897.

89. *Id.* at 898-99.

90. *Id.*

91. *Id.* at 899.

92. *Id.*

V. EQUITABLE ASSIGNMENT OF PROCEEDS

In *Midtown Chiropractic v. Illinois Farmers Insurance Co.*,⁹³ the Indiana Court of Appeals addressed an issue of first impression: whether an accident victim's assignment to a health care provider of the proceeds of a personal injury claim is a valid equitable assignment. As the court explained, the general proposition under Indiana law is that "torts for personal injuries and for wrongs done to the person, reputation, or feelings of the injured party are unassignable."⁹⁴ Over time, however, the list of types of torts that are not assignable has become increasingly narrow so that nonassignability is more the exception than the rule.⁹⁵

As this was a case of first impression, the court looked beyond Indiana and reviewed cases that distinguished "between the assignment of a *claim* for personal injury and the assignment of the *proceeds* from such a claim."⁹⁶ The significance of this distinction is the effect of the assignment on control of the case. Where the *claim* is assigned, control transfers to the assignee, the contract appears to promote champerty, and is void as against public policy.⁹⁷ In contrast, the assignment of the *proceeds* of a claim does not transfer away any of the control over the case, and there is no reason it should be invalid.⁹⁸

The court concluded that an accident victim's assignment to a health care provider of the proceeds of a personal injury claim is a valid equitable assignment.⁹⁹ In reaching this conclusion, the court noted that the ability to assign portions of the proceeds allows an injured person to hire an attorney through a contingency fee arrangement and also allows the plaintiff to pursue the action without the burden of medical bills associated with the accident. "If the assignment of those funds is not permitted, the health care provider may be forced to pursue its claim expeditiously against the patient, a likely effect of which will be to involve the patient in double litigation and put at risk the patient's personal assets."¹⁰⁰ Enforcing an assignment avoids this problem, provides some assurance of payment to the medical provider, and allows the patient a measure of financial stability.¹⁰¹ Thus, the court recognized the assignment and proceeded to consider how it might be enforced.

An assignment vests equitable title to the assigned funds in the assignee.¹⁰²

93. 812 N.E.2d 851 (Ind. Ct. App. 2004).

94. *Id.* at 853 (citing *Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482, 485 (Ind. Ct. App. 1998)).

95. *Id.* (citing *Allstate Ins. Co.*, 696 N.E.2d at 485; *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 340 (Ind. 1991)).

96. *Id.* at 854 (citing *Charlotte-Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.*, 455 S.E.2d 655, 657 (N.C.), *reh'g denied*, 458 S.E.2d 186 (N.C. 1995)).

97. *Id.* (citing *Charlotte-Mecklenburg Hosp. Auth.*, 455 S.E.2d at 655).

98. *Id.*

99. *Id.* at 855.

100. *Id.* (citing *Hernandez v. Suburban Hosp. Ass'n*, 572 A.2d 144, 148 (Md. 1990)).

101. *Id.*

102. *Id.* at 856 (citing *Hernandez*, 572 A.2d at 148).

When enforced in equity, equitable assignments to things that will be acquired in the future are deemed to attach to the funds when the funds come into being.¹⁰³ Thus, during the time between the execution of the assignment and the receipt of the proceeds, the assignee had a mere equitable assignment and once the proceeds were actually paid over, “the equitable title ripened into a legal title sufficient to sustain an action by the assignee” against the party in possession of the proceeds.¹⁰⁴ When an insurer pays a sum to an accident victim in disregard of an assignment, the assignment may be directly enforceable against the insurer.¹⁰⁵ The facts of the case before the court did not clearly provide a date upon which the insurer had been notified of the assignment, so the court reversed summary judgment and remanded for a determination whether the insurance company had notice of the assignment before settling with and paying the injured person.¹⁰⁶

VI. FRAUD AND MISREPRESENTATION

A. *Knowing Misrepresentation*

In *Passmore v. Multi-Management Services, Inc.*, the Indiana Supreme Court held that former employers may be liable for knowing misrepresentation, adopting section 310 of the *Restatement (Second) of Torts*.¹⁰⁷ In this case, a nursing home hired an employee based in part on a favorable recommendation from his former employer, and the employee assaulted a patient. The patient argued that the former employer wrongly gave a favorable recommendation and should be liable for damages. The trial court granted summary judgment in favor of the former employer, which was affirmed by the Indiana Court of Appeals.¹⁰⁸

In holding that there is a claim for conscious misrepresentation, the court stated “we can think of no reason why one who knowingly supplies false information in response to an employment inquiry should not be liable for physical injury that flows thereafter.”¹⁰⁹ The court adopted section 310 of the *Restatement* which defines liability as follows:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

103. *Id.* (citing *Methodist Hosp. of Ind., Inc. v. Town & Country Mut. Ins. Co.*, 197 N.E.2d 773, 779 (Ind. App. 1964)).

104. *Id.* at 856 (citing *Goldwater v. Nitzberg*, 292 N.Y.S. 119, 120 (Mun. Sup. Ct. 1936)).

105. *Id.* at 857.

106. *Id.*

107. 810 N.E.2d 1022, 1024 (Ind. 2004).

108. *Id.*

109. *Id.* at 1025.

- (b) knows
 - i. that the statement is false, or
 - ii. that he has not the knowledge which he professes.¹¹⁰

Although the court adopted the *Restatement*, it nevertheless affirmed summary judgment for the employer because the facts did not support a knowing misrepresentation.¹¹¹

The court then considered whether to adopt section 311 of the *Restatement*, which, among other things, contemplates liability for injury caused by negligent employment references.¹¹² The court declined to adopt this section as it applies to employment references, observing that to do so would discourage former employers from providing information. As the court reasoned, “[on]ly those employers dull-witted enough to issue free-wheeling assessments without calling their lawyers would supply any but the most rudimentary information.”¹¹³

B. Fraud Claim Against Minors Who Use False Identification

As a matter of first impression, the court of appeals held that a bar stated a claim for fraud against minors who gained entry to the bar by presenting fraudulent identifications and signing false affidavits as to their ages.¹¹⁴ In the *Millenium Club* case, the club operated a bar and restaurant, and the minors gained access to the bar by presenting false driver’s licenses and other means of false identification. The club was then charged by the Indiana Alcohol and Tobacco Commission and the State of Indiana for allowing the minors to gain access to the bar. The club filed small claims actions against Avila and other minors seeking \$3000 in damages, but the claims were dismissed for failure to state a claim.¹¹⁵

In reversing the dismissal, the court rejected the minors’ argument that the club’s fraud claim violates public policy. Although the court recognized the

110. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 310 (1965)).

111. *Id.* at 1026.

112. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 311 (1965)). Section 311 states that an entity may be liable for negligent misrepresentation when one negligently gives false information to another. That entity is subject to liability for physical harm caused by:

- [(1)] . . . action taken by the other in reasonable reliance upon such information, where such harm results:
 - (a) to the other, or
 - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or
 - (b) in the manner in which it is communicated.

RESTATEMENT (SECOND) OF TORTS § 311 (1965).

113. *Passmore*, 810 N.E.2d at 1028.

114. *Millenium [sic] Club, Inc. v. Avila*, 809 N.E.2d 906 (Ind. Ct. App. 2004).

115. *Id.* at 908-09.

public policy of “placing the burden of enforcing the underage drinking laws upon the taverns because the tavern is in the best position to prevent the violation and the public policy of barring the Club from shifting the liability for its own illegal actions to the Minors,” the court also recognized “the competing public policy that the Minors should be held accountable for their actions.”¹¹⁶

C. Fraud and Duty to Disclose

In *American United Life Insurance Co. v. Douglas*,¹¹⁷ employees of Computer Business Services, Inc. sued American United Life (“AUL”) for losses sustained by the company’s 401(k) plan based on the purchase of an AUL group annuity contract. Plaintiffs asserted several causes of action, including fraud for failure to disclose all material facts by one on whom the law imposes a duty to disclose. Whether there can be fraud for failure to disclose depends on whether there is a duty to disclose.¹¹⁸ AUL argued that it had no duty to disclose because it had no fiduciary relationship with the plaintiffs because they were involved in an arms length transaction.

The court of appeals agreed that there was no fiduciary relationship, but explained that the existence of a fiduciary relationship is not the only basis for a claim of fraud.¹¹⁹ Although AUL did not have a fiduciary relationship to plaintiffs, it claimed to have special knowledge as to matters of tax planning. The court stated that “AUL has the kind of superior knowledge of the subject which invokes a duty of good faith and fair dealing with the purchaser of its products, including the duty to disclose the nature of the investment[,] especially when it knew that it was selling a product for placement in a 401(k) plan.”¹²⁰ Accordingly, the court upheld the trial court’s denial of a motion for summary judgment on the fraud claim for alleged lack of duty.

AUL also argued on appeal that the alleged misrepresentations or omissions were matters of opinion, not fact, and thus not actionable in fraud. Fraud requires a misrepresentation of a material fact, and expressions of opinion generally cannot be the basis of fraud.¹²¹ The court of appeals observed, however, that the omission in question was not a matter of the appropriateness or value of the annuities but the fact that any investment in a qualified plan is tax deferred and the independent tax deferral property of the annuity in question was unnecessary, which is a matter of law, not a matter of opinion.¹²² The court noted that a misstatement of law cannot form the basis of fraud because everyone is presumed to know the law, but there is an exception for misstatements of law

116. *Id.* at 914.

117. 808 N.E.2d 690 (Ind. Ct. App. 2004).

118. *Id.* at 701.

119. *Id.*

120. *Id.* at 703-04.

121. *Id.* at 703.

122. *Id.*

made by someone professing knowledge in legal matters.¹²³ The court held that this exception would extend here to AUL who proclaimed an expertise in retirement savings plans.¹²⁴ Thus, AUL could be held liable with respect to the alleged misrepresentations regarding the tax deferred nature of the plaintiffs' plan.¹²⁵

VII. PREMISES LIABILITY

A. *Duty of Landowner to Protect from Third Party Criminal Acts*

In *Paragon Family Restaurant v. Bartolini*, the Indiana Supreme Court addressed what it termed a "procedural inconsistency" between prior supreme court cases dealing with the duty of a landowner to protect its invitees from foreseeable criminal attacks.¹²⁶ In *Paragon*, the plaintiff, Mario Bartolini, won a \$280,000 jury verdict against Paragon (d/b/a Round The Corner Pub) as a result of an assault on Bartolini by underage patrons of the pub in its parking lot. On appeal, the pub argued that it was entitled to judgment on the evidence because Bartolini failed to prove duty and proximate cause.

The court noted that landowners generally have a duty to take reasonable precautions to protect invitees from foreseeable criminal acts. It also noted that it held in *Northern Indiana Public Service v. Sharp*, that "an individualized judicial determination of whether a duty exists in a particular case is not necessary where such a duty is well-settled."¹²⁷ Therefore, there is usually no need to determine in each case what duty a business owner owes to its invitees because the law clearly recognizes a duty to use reasonable care to protect business invitees from injury caused by other patrons.

In noting the "procedural inconsistency" in its prior holdings, the court pointed to the *Sharp* case and three cases handed down together in 1999 which held that the determination of whether a landowner owed a duty of reasonable care to protect invitees against third parties depends on whether, under the totality of the circumstances, the criminal act was reasonably foreseeable.¹²⁸ In resolving this inconsistency, the court decided that *Sharp* controls, so that where there is a well-established duty, there is no need for a new judicial determination of duty.¹²⁹ Rather, the trial court must inform the jury of the applicable duty, and it is then for the jury to determine whether the duty is breached. The court further determined that such a duty was sufficiently established in *Paragon*

123. *Id.* at 703-04.

124. *Id.* at 704.

125. *Id.*

126. 799 N.E.2d 1048, 1053 (Ind. 2003).

127. *Id.* at 1052 (citing *N. Ind. Pub. Serv. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003)).

128. *Id.* (citing *L.W. v. W. Golf Ass'n*, 712 N.E.2d 983, 984-85 (Ind. 1999); *Vernon v. Kroger Co.*, 712 N.E.2d 976, 979 (Ind. 1999); *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)).

129. *Id.* at 1053.

where a customer of the pub was assaulted in the parking lot as he was leaving.¹³⁰ The jury received instructions as to the general nature of the duty and was then able to determine whether the criminal attack on Bartolini was reasonably foreseeable and whether the pub failed to exercise reasonable care.¹³¹

Interestingly, in *Star Wealth Management Co. v. Brown*,¹³² decided by the Indiana Court of Appeals after the supreme court decided *Paragon*, the court of appeals applied the “totality of the circumstances” test as set forth in *Delta Tau Delta*, *Kroger*, and *Western Golf*, to determine whether a security company, which had a contract with the landowner, had a duty to protect a tenant who was shot by a third party. The court affirmed summary judgment for the security company on the basis that it had no duty, stating “[a]pplying the totality of the circumstances test pursuant to our supreme court’s analysis and its application, we agree that the evidence presented to us does not show that the shooting of Hester was a reasonably foreseeable act such that Brown had a duty to protect Hester from that act.”¹³³

B. Duty-Control of the Premises

In *Rhodes v. Wright*, the Indiana Supreme Court addressed the issue of duty in the context of whether the farmers or the buyer of chickens controlled the premises where and when the buyer’s truck driver was killed in an accident at the farm.¹³⁴ In that case, the Wrights owned the farm and raised chickens under a contract with Tyson Foods, Inc. Dwayne Gurtz, a truck driver for Tyson, was struck and killed by a forklift while he and other Tyson employees were at the farm picking up chickens. Gurtz parked his truck near one of the chicken houses and began unbooming chains from his trailer while another Tyson employee backed a forklift out of the chicken house. The forklift struck Gurtz from behind and pinned him between the forklift and trailer. At the time of the accident, it was dark and foggy, and there were no lights outside the chicken houses illuminating the area where the Tyson employees were loading.¹³⁵ Gurtz’s estate sued the Wrights for failure to light the loading area and failure to warn him.

The supreme court reversed the trial court’s grant of summary judgment for the farm owners, finding a factual dispute as to whether Tyson or the farm owner controlled the premises “where and when the accident occurred,” and that the jury should decide the issue.¹³⁶ Initially, the court noted that Indiana law, not the contract between Tyson and the farm, governed whether a duty exists.¹³⁷ The question of duty in the context of premises liability depends on whether the

130. *Id.*

131. *Id.*

132. 801 N.E.2d 768 (Ind. Ct. App. 2004).

133. *Id.* at 773.

134. 805 N.E.2d 382 (Ind. 2004).

135. *Id.* at 384-85.

136. *Id.* at 386.

137. *Id.* at 385.

defendant controlled the premises. Generally, the question of duty is for the court to decide, but the existence of a duty may depend upon underlying facts which require resolution by the trier of fact.¹³⁸

The court stated that “even if Tyson controlled the premises while it caught chickens, that would not automatically relieve Defendants of responsibility for injuries to Tyson’s employees” because the farm owners had always controlled the lighting and there was evidence that the lack of lighting may have contributed to the accident.¹³⁹ Although Tyson provided the farm with specifications for building the chicken houses, it had not prescribed any procedures for lighting.

In *Daisy v. Roach*, the Indiana Court of Appeals cited *Rhodes* in affirming the trial court’s grant of summary judgment in favor of a homeowner who was sued by an employee of an independent contractor who fell while climbing down a ladder when the ladder slid on ice.¹⁴⁰ Although noting that the ground was frozen and icy, the court of appeals stated that the cause of the accident was the failure of the employees of the independent contractor to safely secure the ladder. Accordingly, the landowner was not liable because there was no assertion that the landowner had any control over the manner in which the ladder was used.¹⁴¹

C. Acceptance Rule

Since 1896, Indiana law has recognized the acceptance rule.¹⁴² In general, this rule provided that “contractors do not owe a duty of care to third parties after the owner has accepted the work.”¹⁴³ In *Peters v. Forster*, the Indiana Supreme Court abandoned this “outmoded relic”¹⁴⁴ in favor of the “so-called ‘modern rule’ or ‘foreseeability doctrine.’”¹⁴⁵

Reviewing the history of the acceptance rule, the court noted the primary reasons supporting the rule were: “(1) the application of the doctrine of privity to cases involving negligence; and (2) the owner’s control of the entity when the injury occurred.”¹⁴⁶ Since the adoption of the acceptance rule, however, the privity of contract requirement in the law of negligence has largely eroded. In 1997, the Indiana Supreme Court removed the privity requirement from personal injury actions for defective products.¹⁴⁷ Despite that change in products liability law, Indiana continued to allow privity as an absolute defense for contractors,

138. *Id.* at 385-86.

139. *Id.* at 386.

140. 811 N.E.2d 862 (Ind. Ct. App. 2004).

141. *Id.* at 866-67.

142. *Peters v. Forster*, 804 N.E.2d 736, 738-40 (Ind. 2004) (citing *Daugherty v. Herzog*, 44 N.E. 457 (Ind. 1896)).

143. *Id.* (quoting *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996); *Citizens Gas & Coke Util. v. Am. Econ. Ins. Co.*, 486 N.E.2d 998, 1000 (Ind. 1985)).

144. *Id.* at 737.

145. *Id.* at 741.

146. *Id.* at 739-40 (citations omitted).

147. *Id.* at 740 (citing *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 241 (Ind. 1997)).

subject to numerous exceptions.¹⁴⁸ Similarly, the “control” rationale for the acceptance rule had also waned in importance as courts began to recognize that the rule shifted responsibility from a negligent party to an innocent one who had paid the negligent party for services based on the negligent party’s perceived expertise and knowledge.¹⁴⁹

The court quoted Professor Prosser¹⁵⁰ and the Restatement (Second) of Torts,¹⁵¹ as examples reflecting the modern trend, abandoned the acceptance rule, and endorsed the “better view” that there are insufficient grounds to differentiate between a manufacturer of goods and a building contractor.¹⁵² The court explained that the new rule, consistent with traditional principles of Indiana negligence law:

provides that a builder or contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that a third party would be injured by such work due to the contractor’s negligence.¹⁵³

The court hastened to add that the rule did not create absolute liability for the contractor, but was instead predicated upon negligence and required proof of duty, breach of duty, and injury proximately caused by the breach.¹⁵⁴

148. *Id.* The exceptions included situations where (1) the contractor turns over work in a dangerously defective, inherently dangerous, or imminently dangerous condition that is dangerous to human life or where (2) “the thing sold or constructed [is] not imminently dangerous to human life, but may become such by reason of some concealed defect” known to the vendor or constructor and fraudulently concealed. *Id.* (citing *Citizens Gas*, 486 N.E.2d at 1000; *Holland Furnace Co. v. Nauracaj*, 14 N.E.2d 339, 342 (Ind. App. 1938)). The court also noted other exceptions that had not been applied in Indiana. *See id.* at 741 n.5 (citing 41 AM. JUR. 2D *Independent Contractors* § 74 (1995)).

149. *Id.* (quoting *Pierce v. ALSC Architects, P.S.*, 890 P.2d 1254, 1262 (Mont. 1995)).

150. *Id.* at 742 (quoting *W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS* § 104A at 723 (5th ed. 1984)) (“It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done. This applies not only to contractors doing original work, but also to those who make repairs, or install parts, as well as supervising architects and engineers. There may be liability for negligent design, as well as for negligent construction.”).

151. *Id.* (quoting *RESTATEMENT (SECOND) OF TORTS* § 385 (1965)) (“One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor make a chattel for the use of others.”).

152. *Id.*

153. *Id.*

154. *Id.* at 737-38.

The court then applied the rule to the facts before it. There, the plaintiff, a guest of the homeowners, sued an independent contractor for negligently installing a ramp access to the home. The ramp had been built and installed at another residence and, after its prior user passed away, the homeowners purchased the ramp and paid the defendant, an independent contractor, to transport the ramp to the homeowner's property and attach it to the front of their house. At the time the ramp was installed, the contractor was aware that it did not meet building codes for a wheelchair ramp, but was unaware of requirements for other types of ramps. After installation, the homeowners' daughter attached carpeting to the ramp. The plaintiff was injured leaving the residence when he slipped and fell on the ramp.¹⁵⁵

On appeal, the contractor argued that the chain of causation was broken between his action and the plaintiff's injury by (1) the homeowner's control of the ramp, (2) the addition of the carpet to the ramp by the homeowners' daughter, or (3) the lack of evidence that the ramp was likely to cause injury.¹⁵⁶ The court viewed this as a proximate cause issue. Noting a rigorous definition of proximate cause is elusive, the court defined it as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred."¹⁵⁷ The foreseeability of an intervening cause and whether the defendant's conduct is the proximate cause of an injury are questions of fact for a jury to decide. Thus, while the court found that the contractor owed a duty of reasonable care, it could not determine as a matter of law either the breach of duty or proximate cause issues and reversed the grant of summary judgment.¹⁵⁸

D. Res Ipsa Loquitur

In *Rector v. Oliver*,¹⁵⁹ the Indiana Court of Appeals extensively reviewed the relationship between the doctrine of *res ipsa loquitur* and premises liability. The plaintiff was injured when a light fixture fell from the ceiling of defendant's store and struck the plaintiff on the head and shoulder.¹⁶⁰ The plaintiff's complaint alleged separate claims based on negligence and the doctrine of *res ipsa loquitur*.¹⁶¹

The court explained that the doctrine of *res ipsa loquitur* "is a rule of evidence which permits an inference of negligence to be drawn based upon the surrounding facts and circumstances of the injury."¹⁶² The effect of the doctrine is to allow negligence, like any other fact or condition, to be proven by

155. *Id.*

156. *Id.* at 743.

157. *Id.* (quoting *Orville Milk Co. v. Beller*, 486 N.E.2d 555, 559 (Ind. Ct. App. 1985)).

158. *Id.*

159. 809 N.E.2d 887 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

160. *Id.* at 888.

161. *Id.* at 889.

162. *Id.* (quoting *K-Mart Corp. v. Gipson*, 563 N.E.2d 667, 669 (Ind. Ct. App. 1990)).

circumstantial evidence and requires the plaintiff to establish: “(1) that the injuring instrumentality was within the exclusive management and control of the defendant or its servants, and (2) that the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care.”¹⁶³ The doctrine is designed to allow an inference of negligence to be drawn when direct evidence is lacking, but it does not allow the plaintiff to win by default.¹⁶⁴ The doctrine is not a distinct cause of action.

The court rejected the plaintiff’s argument that premises liability cases referenced by the defendant had no bearing on the issues on appeal, explaining that *res ipsa loquitur* and premises liability are “not entirely unrelated”:

Indeed, it is not hard to imagine that if a plaintiff is injured by an instrumentality in the exclusive control and management of the defendant, that the plaintiff might often be on the premises of the defendant. In other words, premises liability and *res ipsa loquitur* are not two entirely different beasts. The doctrine of *res ipsa loquitur* is not a separate cause of action, but is instead a rule of evidence whereby under certain circumstances, negligence may be inferred. Premises liability is also a concept related to negligence law.

Furthermore, the position adopted from the Restatement (Second) of Torts in *Burrell* . . . states that a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, the conditions listed therein are met. To say that a premises owner may be liable under the doctrine of *res ipsa loquitur* when they could not be liable under the premises liability standard would seem to fly in the face of the standard adopted in *Burrell*. . . .¹⁶⁵

In order to establish the applicability of the doctrine to the facts of the case, the plaintiff must demonstrate exclusive control by the defendant *at the time* of the alleged negligent act.¹⁶⁶ The court rejected the requirement that the defendant must have installed the instrumentality in order to establish exclusive control before the jury might infer negligence.¹⁶⁷ Rather, the court explained a jury may weigh facts related to installation as part of its decision whether the negligence was in the installation or maintaining of the instrumentality.¹⁶⁸

163. *Id.* at 890 (citing *K-Mart Corp.*, 563 N.E.2d at 669).

164. *Id.* at 891.

165. *Id.* at 894-95 (citing *Burrell v. Meads*, 569 N.E.2d 637, 639-40 (Ind. 1991)).

166. *Id.* at 892 (quoting *Aldana v. Sch. City of E. Chicago*, 769 N.E.2d 1201, 1207 (Ind. Ct. App. 2002)).

167. *Id.* at 891.

168. *Id.* at 892.

VIII. TORT CLAIMS ACT/GOVERNMENTAL IMMUNITY

A. Law Enforcement Immunity

The Indiana Court of Appeals handed down several decisions interpreting “law enforcement immunity” under the Indiana Tort Claims Act (“ITCA”). Indiana Code section 34-13-3-3 provides for immunity as follows:

A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following:

...

(8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act or enforcement constitutes false arrest or false imprisonment.¹⁶⁹

In *St. Joseph County Police Department v. Shumaker*, the Indiana Court of Appeals found that the police department was entitled to immunity under this provision in a suit for negligence alleging that the police department released a suspect without requiring him to post a bond that should have been posted, after which he committed several murders.¹⁷⁰ In addressing the immunity issue, the court of appeals first noted that the scope of “law enforcement immunity” has been changed by the courts over the years and outlined the history of the provision’s interpretation since its inception.¹⁷¹

The court described the scope of “law enforcement immunity” as follows:

We therefore conclude that the “enforcement” spoken of in what is now Section 3(8) of the ITCA means compelling or attempting to compel the obedience of *another* to laws, rules, or regulations, and the sanctioning or attempt to sanction a violation thereof. It would also, by the plain meaning of the statute, include the failure to do such. However, it does not include compliance with or following of laws, rules, or regulations by a governmental unit or its employees. Neither does it include failure to comply with such laws, rules, or regulations. Moreover, a governmental entity will be immune only for adopting, or enforcing, or failure to adopt or enforce, a law, rule, or regulation within the scope of the entity’s purpose of operational power.¹⁷²

In applying these principles to the facts, the court held that the police department was immune.¹⁷³ The court noted that the plaintiffs claimed that the department negligently released an individual without posting the proper bond,

169. IND. CODE § 34-13-3-3 (2004).

170. 812 N.E.2d 1143 (Ind. Ct. App. 2005).

171. *Id.* at 1146-50.

172. *Id.* at 1150.

173. *Id.* at 1151.

which necessarily alleged that it failed to enforce the law. The court also noted that the department is within the scope of Section 3(8) immunity here because the department's "operational purpose or mission" includes the enforcement of bond orders and running the jail.¹⁷⁴

In *Daggett v. Indiana State Police*, which was handed down on the same day as *Shumaker*, the Indiana Court of Appeals held the Indiana State Police immune under section 3(8) where the plaintiff claimed that he was injured when police restrained him while responding to an emergency medical call.¹⁷⁵ In *Daggett*, the police were called to the scene by paramedics who were responding to an emergency call because the plaintiff was combative with paramedics such that they could not treat him.¹⁷⁶ In finding the officer's conduct immune, the court reasoned that when law enforcement officers respond to a request to help restrain combative patients, the officers are enforcing the law to the extent they are preventing the patient from injuring himself or the medical personnel.¹⁷⁷ The court rejected the plaintiff's arguments that he could not have formed the intent necessary to commit a crime because he was having a seizure at the time and that no criminal charges were ultimately filed against him. The court responded that section 3(8) does not require that a law enforcement officer first arrest someone before the officer's actions can be immune and that plaintiff's criminal intent (or lack thereof) was irrelevant to whether the officer's actions were immune.¹⁷⁸

In *Linden v. Health Care 2000, Inc.*, which was decided prior to *Shumaker*, the court of appeals determined that section 3(8) immunity applied where insureds filed a class action suit against various Commissioners of the Indiana Department of Insurance for failing to enforce laws prohibiting Health Care 2000 from operating as an HMO without a certificate of authority.¹⁷⁹ The court also held that law enforcement immunity extended to the plaintiffs' claim of failure to warn them of the HMO's illegal activities.¹⁸⁰

B. Sufficiency of Tort Claim Notice

In *Howard County Board of Commissioners v. Lukowiak*, the Indiana Court of Appeals addressed the sufficiency of a tort claims notice.¹⁸¹ Under the Tort Claims Act, in order to make a claim against a political subdivision, a claimant must provide the political subdivision with notice 180 days after the loss occurs.¹⁸² The notice must include the circumstances in which the loss arose, the extent of the loss, the time and place of the loss, the names of all persons

174. *Id.* at 1150-51.

175. 812 N.E.2d 1151 (Ind. Ct. App. 2004).

176. *Id.*

177. *Id.* at 1153.

178. *Id.*

179. 809 N.E.2d 929, 935 (Ind. Ct. App. 2004).

180. *Id.*

181. 810 N.E.2d 379 (Ind. Ct. App. 2004).

182. *Id.* at 381 (citing IND. CODE § 34-13-3-8).

involved if known, the amount of damages sought, and the residence of the claimant at the time of the loss and the time of the notice.¹⁸³ Initially, the court rejected the Board's argument that the plaintiffs did not provide proper notice where the tort claims notice was sent on behalf of the plaintiffs by a claims representative of the plaintiffs' insurer.¹⁸⁴

The court then addressed whether the tort claims notice provided information regarding the plaintiffs' damages with sufficient specificity. Generally, a tort claims notice is sufficient if it "substantially complies with the content requirements of the statute."¹⁸⁵ The notice provided on behalf of Kellie and Paul Lukowiak stated that they suffered damages to their vehicle and the amount of such damages. It also stated that medical expenses were anticipated, although the notice did not specify the injury. The court found that this put the Board on notice that Kellie suffered an injury and would likely seek compensation for medical treatment. However, the court found that there was no way in which the notice could be construed to include Kellie's claim for lost wages or Paul's claim for loss of consortium.¹⁸⁶ On rehearing, the court clarified that the notice of claim was sufficient to notify the Board of Kellie's claim for medical expenses, but that it was not adequate notice of personal injury damages in excess of medical expenses.¹⁸⁷

C. Choice of Law—Dépeçage

*Simon v. United States*¹⁸⁸ presented two certified questions to the Indiana Supreme Court from the Third Circuit Court of Appeals based upon choice of law analysis. The case involved a wrongful death suit related to the crash of a small private aircraft which began its flight in Pennsylvania, included an overnight stop in Ohio, and ended in Kentucky while attempting to land. The plane never flew over Indiana airspace. Two of the passengers lived in Pennsylvania and one lived in Georgia; the pilot lived in New Jersey but worked in Pennsylvania. The plane was owned by a Delaware-based, wholly owned subsidiary of a company incorporated in Pennsylvania, where the plane was hangared.¹⁸⁹ There were four wrongful death complaints filed in federal court; two were later settled. The remaining two were pending on interlocutory appeal when the Third Circuit certified two questions of law to the Indiana Supreme

183. *Id.* (citing IND. CODE § 34-13-3-10).

184. *Id.* at 381-82. However, the court advised that it did not address whether it is appropriate for a claims representative to "represent" a claimant for purposes of providing a tort claims notice and whether such action constitutes the unauthorized practice of law. *Id.* at 382 n.1. The court stated that if such action does constitute the unauthorized practice of law, it is for the Indiana Supreme Court to enjoin such conduct or the prosecutor to seek criminal charges.

185. *Id.* at 382 (citing *Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989)).

186. *Id.* at 383.

187. *Howard County Bd. of Comm'rs v. Lukowiak*, 813 N.E.2d 391, 393 (Ind. Ct. App. 2004).

188. 805 N.E.2d 798 (Ind. 2004).

189. *Id.* at 800.

Court: (1) whether a true conflict of law exists between Indiana's and the District of Columbia's choice of law rules; and (2) if so, how should a split among the choice of law factors identified in *Hubbard Manufacturing Co., Inc. v. Greeson*¹⁹⁰ be resolved and which jurisdiction's substantive law would Indiana apply under the facts of the case?

Accepting the certification, the court concluded that a true conflict exists between the two jurisdictions because D.C.'s choice-of-law rules permit *dépeçage* and Indiana's do not.¹⁹¹ Indiana courts apply the *lex loci delicti* rule, applying the law of the state in which the tort was committed.¹⁹² On certification, the plaintiff argued that Indiana liberalized the *lex loci* rule in *Hubbard* and implicitly adopted *dépeçage* by its use of "language similar to that used in the Restatement (Second) of Conflict of Laws" and by reference to factors listed in the Restatement as factors courts might consider.¹⁹³ "*Dépeçage* is the process of analyzing different issues within the same case separately under the laws of different states."¹⁹⁴ The Indiana Supreme Court rejected the plaintiff's argument, explaining that references to factors from the Restatement were "mere examples" of factors the court might consider and were not an exclusive list. Second, the court noted that using language similar to the Restatement does not amount to an adoption of *dépeçage*, a matter not even contemplated in that appeal.¹⁹⁵ The *dépeçage* issue demonstrated a true conflict of laws between Indiana and D.C.

The court next applied Indiana's choice-of-law analysis to address what law should be applied, explaining that the court must determine preliminarily whether the differences between the laws of the states are "important enough to affect the outcome of the litigation."¹⁹⁶ If such a conflict exists, there is a presumption that *lex loci delicti* will apply; and the court will apply the substantive law of the state where the last event necessary to make an actor liable for the alleged wrong occurs.¹⁹⁷ This presumption may be overcome if the court is persuaded that "the place of the tort 'bears little connection' to this legal action."¹⁹⁸ Although the parties argued that either Indiana or Pennsylvania law should be applied, the court concluded under *lex loci delicti* that Kentucky law should be applied, as that is where the plane crashed and the decedents died.¹⁹⁹ Under the facts, however, Kentucky is insignificant to the action. Therefore, the court considered the second step of the *Hubbard* analysis, applying the law of the state with the most significant relationship to the case.²⁰⁰ Considering the three factors

190. 515 N.E.2d 1071 (Ind. 1987).

191. *Simon*, 805 N.E.2d at 803.

192. *Id.* at 802.

193. *Id.*

194. *Id.* at 801.

195. *Id.* at 802.

196. *Id.* at 805 (quoting *Hubbard*, 515 N.E.2d at 1073).

197. *Id.*

198. *Id.* (quoting *Hubbard*, 515 N.E.2d at 1074).

199. *Id.* at 806.

200. *Id.*

Hubbard suggests might be relevant—“(1) the place [or places] where the conduct causing the injury occurred; (2) the residence or place of business of the parties; and (3) the place where the relationship is centered”—the court concluded the “gravamen of this case is the allegedly negligent conduct.”²⁰¹ Thus, the most important relevant factor is where the conduct causing the injury occurred because an individual’s actions and the recovery based on those actions should be governed by the law in the state in which he acts.²⁰² Here, the negligent conduct occurred in both Indiana and D.C., but the conduct in Indiana was more proximate to the harm, so Indiana law would apply.²⁰³

IX. WORKERS’ COMPENSATION

During the survey period, the Indiana Supreme Court addressed the application of the Worker’s Compensation Act²⁰⁴ on four significant occasions. The court first addressed authorization of medical care and then, in a trilogy of cases handed down on one day, clarified standards for determining whether injuries “arose out of” and “in the course of” employment under the Worker’s Compensation Act.

A. Authorization for Medical Care

In the first case, *Daugherty v. Industrial Contracting & Erecting*,²⁰⁵ an employee injured on the job underwent knee replacement surgery without prior approval from the employer. Although the Worker’s Compensation Board found the surgery was reasonable and appropriate, it declined to award payment for it since the employee did not have his employer’s authorization before the surgery.²⁰⁶ The employee appealed and a divided panel of the Indiana Court of Appeals affirmed.

Granting transfer, the supreme court reversed. After quoting the relevant statute, the court recited the general rule that an employee is not free to elect at his employer’s expense additional treatment or other doctors not tendered by the employer.²⁰⁷ Nevertheless, the court noted three circumstances under which the employee may select medical treatment: “(1) in an emergency; (2) if the employer fails to provide needed medical care; or (3) for other good reason.”²⁰⁸ The court recognized that an employee who pursues other treatment than that provided by the employer does so at his or her own peril and risks not being reimbursed. The mere fact that the additional medical treatment is an acceptable

201. *Id.*

202. *Id.* at 807.

203. *Id.*

204. IND. CODE § 22-3-1-1 to -12-5 (2004).

205. 802 N.E.2d 912 (Ind. 2004).

206. *Id.* at 914.

207. *Id.* at 915 (citing IND. CODE § 22-3-3-4).

208. *Id.* at 916 (citing IND. CODE § 22-3-3-4(d); *Richmond State Hosp. v. Walden*, 446 N.E.2d 1333, 1336 (Ind. Ct. App. 1983)).

method of treatment does not mean that the employer should be required to pay.²⁰⁹ Instead, the court adopted a test set out by the Virginia Court of Appeals, applying a similar Worker's Compensation Statute to a case where the injured employee sought treatment without a referral where there was no emergency:

[I]f the employee, without authorization but in good faith, obtains medical treatment different from that provided by the employer, and it is determined that the treatment provided by the employer was inadequate treatment for the employee's condition and the unauthorized treatment received by the claimant was medically reasonable and necessary treatment, the employer should be responsible, notwithstanding the lack of prior approval by the employer. These legal principles which provide a basis for the payment of unauthorized medical treatment are part of the "other good reasons test."²¹⁰

In addition to adopting this test, the court noted it was consistent with the longstanding rule in this state that the Act should be liberally construed to "effectuate the humane purposes of the Act."²¹¹ Although reimbursement for care not authorized should be a rare exception, if the employee can demonstrate good reason for the unauthorized care, then subject to the approval of the Board, the employer will be held responsible for payment.²¹² On the evidence in the record, the unauthorized medical care fell under the "other good cause" exception because the employee still suffered pain and was unable to return to work after the approved treatment (showing the treatment was inadequate), he sought approval before he acted (showing his good faith), and, although it refused to direct payment, the Board had found the care "reasonable and appropriate."²¹³

B. Injuries "Arising Out Of" and "In The Course Of" Employment

In *Bertoch v. NBD Corp.*,²¹⁴ a security guard suffered a fatal heart attack while working in that position in a building where a fire had occurred. The guard's body was found by firefighters on the landing between the tenth and eleventh floors. There was evidence on the twelfth floor of a fire in the elevator-switching panel that had "self-extinguished."²¹⁵ His widow filed an Application for Adjustment of Claim with the Worker's Compensation Board. A single member of the Board heard the claim and awarded full death benefits, finding that the death occurred as a result of the guard's response to a fire alarm in the building, which produced a "psychological shock, which required unusual

209. *Id.* at 917.

210. *Id.* at 918 (quoting *Shenandoah Prods., Inc. v. Whitlock*, 421 S.E.2d 483, 486 (Va. Ct. App. 1992)).

211. *Id.* at 919 (quoting *Talas v. Correct Piping Co.*, 435 N.E.2d 22, 28 (Ind. 1982)).

212. *Id.*

213. *Id.*

214. 813 N.E.2d 1159 (Ind. 2004).

215. *Id.* at 1160.

physical exertion beyond his routine employment.”²¹⁶ The employer requested review. The Board reversed the single member, finding the timing of the heart attack was “coincidence,” and concluded that the guard’s death did not arise out of his employment.²¹⁷ The Indiana Court of Appeals affirmed in an unpublished opinion. The Indiana Supreme Court granted transfer and reversed.

The Act provides for compensation of injury or death arising out of and in the course of employment.²¹⁸ The court of appeals had determined that the evidence regarding the location of the guard’s body supported an inference that he had been investigating the fire without waiting for the fire department, an act beyond his required duties as his job description required him to call 911 in the event of a fire.²¹⁹

The Indiana Supreme Court rejected this analysis, explaining that “[a]n action that directly or indirectly advances an employer’s interest or is for the mutual benefit of the employer and employee may be incidental to and arise in the course of employment.”²²⁰ The court further explained that an employee is acting within the scope of his employment “when he does something that a reasonable person would do or would be expected to do under the circumstances.”²²¹ Rescue and emergency responses are often found to be within the scope of employment, even if they are not specific duties of the employee. Thus, a response to the fire was within the scope of the guard’s employment. Although there was no direct evidence that the guard was responding to the fire, the circumstances certainly suggested it and that was the conclusion the Board drew. Thus, the injury arose “in the course of employment.”

Next the court considered whether it arose “out of” employment. “An injury ‘arises out of’ employment when a causal nexus exists between the injury or death and the duties or services performed by the injured employee.”²²² Because the evidence showed the guard had a pre-existing heart condition, the court of appeals reasoned that he “must demonstrate that his heart failure was either preceded by some untoward or unexpected incident, or resulted from the aggravation of a previously deteriorated heart or blood vessel.”²²³ The supreme court rejected this as “too restrictive,” reiterating its previous rejection of the “untoward or unexpected incident”²²⁴ requirement in *Evans v. Yankeetown Dock Corp.*²²⁵ Even when an employee has a pre-existing condition that contributes to his injury, the employee is still “entitled to recover for the full extent of the injury, including an aggravation or triggering of a pre-existing injury, causally

216. *Id.*

217. *Id.*

218. *Id.* at 1160-61 (citing IND. CODE § 22-3-2-2 (1998)).

219. *Id.* at 1161.

220. *Id.* (citing *Ind. & Mich. Elec. Co. v. Morgan*, 494 N.E.2d 991, 994 (Ind. Ct. App. 1986)).

221. *Id.* (citing *Prater v. Ind. Briquetting Corp.*, 251 N.E.2d 810, 813 (Ind. 1969)).

222. *Id.* (citing *Milledge v. The Oaks*, 784 N.E.2d 926, 929 (Ind. 2003)).

223. *Id.* at 1162.

224. *Id.*

225. 491 N.E.2d 969, 974 (Ind. 1986).

connected with the employment.”²²⁶ Finally, the court explained that the dispositive question is not “whether an injury resulted from an unusual event,” but rather is “merely whether the injury itself was unexpected.”²²⁷

The court found that the evidence led to a result contrary to the Board’s findings and concluded: “[a]lthough [the guard] suffered from a severe preexisting condition, the expert medical opinions and the circumstances surrounding his death are compelling evidence that the fire and his attempted response to it aggravated his condition and ultimately contributed to his fatal heart attack.” Therefore, his claim was compensable under the Act.²²⁸

In *Global Construction, Inc. v. March*,²²⁹ the employee was leaving the foundry where he was assigned by his employer when he was injured by strikers.²³⁰ The evidence showed that, when the employee was leaving work after finishing his shift, a large number of picketing strikers were congregated in a parking lot across from the employee exit, shining headlights at the gate to impair the vision of those trying to exit the foundry. Shortly after the employee exited the gate, his vision was blinded and his vehicle was struck by an object. When a second object struck and cracked the employee’s windshield, he stopped his vehicle, backed up, and either got out or was pulled out of his vehicle. A verbal confrontation ensued, followed by an attack on the employee, who was repeatedly struck with a 2 x 4 board and, as a result, suffered significant injuries.²³¹ The employee filed a claim for workers’ compensation, and the Board entered judgment for the employee, finding the injuries arose out of and the in the course of his employment. The court of appeals reversed, finding that the injury neither “arose out of” nor occurred “in the course of” his employment.²³² The Indiana Supreme Court granted transfer and reversed the court of appeals.

Here, the employer argued that the injuries did not fall within the scope of the Act because the employee “was not on the employer’s premises, had already completed his work, and was not performing any employment duties.”²³³ Noting that, in general, injuries sustained en route to or from the workplace are not covered by the Act, the court explained that employment “necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with the accident.”²³⁴ Referencing cases where parking lots, private drives, and even streets separating a work place from an employer-provided parking lot have all been held to be extensions of work premises for purposes of the Act due to the

226. *Bertoch*, 813 N.E.2d at 1162 (citing *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987)).

227. *Id.* (citing *Evans*, 491 N.E.2d at 975; *Hansen*, 507 N.E.2d at 577).

228. *Id.* at 1163.

229. 813 N.E.2d 1163 (Ind. 2004).

230. *Id.* at 1165.

231. *Id.*

232. *Id.* at 1166.

233. *Id.*

234. *Id.* at 1167 (quoting *Reed v. Brown*, 152 N.E.2d 257, 259 (Ind. App. 1958)).

employer's control,²³⁵ the court concluded similar reasoning applied to this case. Here, the employee "was injured while leaving work using the only available means of egress from the employer's parking lot . . . [which] exposed him to a danger specifically related to [his] employment—passing through a group of agitated striking workers."²³⁶ Rejecting the employer's argument that the risk of injury was not peculiar to the employee, but instead posed a threat to all who used the street, the court stated "it [was] obvious that a worker exiting a plant under picketing is at greater risk than a passing motorist" and concluded, "[u]nder these circumstances, the area where the strikers [were] gathered [was] for all practical purposes an extension of the workplace" and the employee "was not on his own time until he was freed of the stress of exiting."²³⁷

Similar to its process in *Bertoch*, the court considered whether the employee's response was "within the range of reasonable responses," concluding that even if the employee's act of getting out of his truck was contrary to orders, it was "a predictable response to a plainly stressful situation created by the circumstances of his employment," and strict conformance to formal instructions is not required "when faced with sudden and intentional wrongful conduct from others."²³⁸ The court acknowledged that, although "arising from" and "in the course of" are usually discussed as independent factors, "in practice the two 'are not, and should not be, applied entirely independently.'"²³⁹

Finally, the court considered whether there was a causal connection between the injury and the worker's employment, which is necessary to establish a compensable injury under the Act. The employer argued that the injury occurred because of the employee's decision to get out of his truck and confront the strikers. Although the court agreed that if an employee involved in an altercation is found to be the aggressor, he may be denied compensation, it disagreed with the application of this rule in this case as the Board found that the employee did not instigate a physical confrontation.²⁴⁰ The court explained that "[o]ne basis to establish a causal connection is to show the injury resulted from a risk specific to the employment."²⁴¹ "The pivotal question is whether the person's employment increased the hazard that led to the injury."²⁴² Thus, the court concluded that "the same chain of events that place[d] [the employee] in the course of his employment also establishe[d] that his injuries arose from his

235. *Id.* (citing *Clemans v. Wishard Mem'l Hosp.*, 727 N.E.2d 1084, 1087 (Ind. Ct. App. 2000); *Reed*, 152 N.E.2d at 259).

236. *Id.*

237. *Id.*

238. *Id.* at 1168.

239. *Id.* (quoting ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 29.01, at 29-1 (2004)).

240. *Id.* (quoting *Berryman v. Fettig Canning Corp.*, 399 N.E.2d 840, 843 (Ind. Ct. App. 1980)).

241. *Id.* at 1169 (quoting *Wine-Settergren v. Lamey*, 716 N.E.2d 381, 389 (Ind. 1999)).

242. *Id.* (quoting *Segally v. Ancerys*, 486 N.E.2d 578, 581 (Ind. Ct. App. 1985)).

employment.”²⁴³

In the third of the trilogy of cases, *Knoy v. Cary*,²⁴⁴ the Indiana Supreme Court considered employer-sponsored activities. In this case, the employer adopted a “master plan” which had as one of its goals to work with local environmental groups. Toward this goal, it coordinated a “clean up project” at a local park, posted notice of the project on a company bulletin board, and supplied equipment, work gloves, food, and beverages to those working the project. The company publicized the event in the newspaper.²⁴⁵ The plaintiff sued his co-worker for injuries incurred when a tractor driven by the co-worker malfunctioned during the after-hours community service project. The co-worker moved to dismiss based upon the theory that the plaintiff’s exclusive remedy was through the Worker’s Compensation Act.²⁴⁶

Comparing cases in which the courts have found injuries incurred during company-sponsored “social” events, such as parties and recreational outings, to be compensable under the Act as they are intended to foster goodwill among the employees, the court noted that events such as the company-sponsored clean up project are calculated to foster a business benefit, namely goodwill within the community.²⁴⁷ Although attendance was not mandatory, it was encouraged through the posting of notices and invitations to participate, as well as by providing the tools and refreshments. The court rejected the court of appeals’ focus on the voluntary nature of the activity and concluded that mandatory attendance is not required.²⁴⁸ Noting the Act requires broad construction and the benefits that an employer’s public image may gain from participation in such projects, the court expressed its intent not to discourage such activities and concluded, “[i]f that construction is thought to inhibit corporate participation in charitable and community events unduly, that balance is one for the legislature to adjust.”²⁴⁹

X. PUNITIVE DAMAGES

As an issue of first impression, in *Wohlwend v. Edwards*, the Indiana Court of Appeals considered whether evidence of a tortfeasor’s behavior after the event giving rise to the tort claim is admissible to establish punitive damages.²⁵⁰ In that case, the Edwardses filed a suit against Wohlwend, alleging negligence in causing a motor vehicle accident. The evidence revealed that Wohlwend, who was intoxicated, crossed the center line and collided head-on with the Edwards’ vehicle. Wohlwend was arrested and convicted for operating while intoxicated.

243. *Id.*

244. 813 N.E.2d 1170 (Ind. 2004).

245. *Id.*

246. *Id.*

247. *Id.* at 1172.

248. *Id.*

249. *Id.* at 1173.

250. 796 N.E.2d 781 (Ind. Ct .App. 2003).

The trial court admitted evidence that after the accident with Edwards, Wohlwend was twice arrested for operating while intoxicated.²⁵¹

On appeal, the court of appeals held that the trial court erred in allowing the evidence of Wohlwend's post-accident conduct.²⁵² The court reasoned that any relevance of such post-accident conduct would be outweighed by the danger that the jury would punish Wohlwend for this conduct instead of his conduct related to the Edwards' injuries.²⁵³ The court also reasoned that allowing such evidence would conflict with the requirement that punitive damages be connected to and proportional to actual damages.²⁵⁴ The court noted that the law requires compensatory damages as a prerequisite for punitive damages and that punitive damages are capped at the greater of \$50,000 or three times the compensatory damages.²⁵⁵

The court also discussed recent developments in the law of punitive damages and constitutional law, including the United States Supreme Court decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, in which the Supreme Court broadened the due process protections in the context of punitive damages.²⁵⁶ The Supreme Court stated that courts should consider three factors in assessing claims that the amount of a punitive damages award constitutes a deprivation of property without due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases.²⁵⁷ Thus, as the court noted, both Indiana law and the U.S. Constitution require some degree of proportionality between punitive and actual damages.²⁵⁸

XI. PARENTAL IMMUNITY

In *C.M.L. v. Republic Services, Inc.*, the court addressed, as a matter of first impression, whether the doctrine of parental immunity applies in the context of a stepparent relationship.²⁵⁹ In this case, a stepchild of Kenneth Brabant was injured while he accompanied Brabant on his garbage collection route for Republic. The boy was asleep under a blanket on the passenger seat, but after Brabant exited the truck to collect garbage, the boy got out of the truck to urinate near the truck. Not realizing that the boy had exited the truck, Brabant then

251. *Id.* at 782-83.

252. *Id.* at 789.

253. *Id.* at 787.

254. *Id.* at 785.

255. *Id.* at 786 (citing *Sullivan v. Am. Cas. Co.*, 605 N.E.2d 134, 140 (Ind. 1992); IND. CODE §§ 34-51-3-4, 34-51-3-5).

256. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

257. *Campbell*, 538 U.S. at 418.

258. *Wohlwend*, 796 N.E.2d at 797.

259. 800 N.E.2d 200 (Ind. Ct. App. 2003).

started to pull the truck forward and struck him. As a result, C.M.L. filed a complaint against Brabant and Republic alleging negligence. The trial court granted summary judgment for Brabant, on grounds that the parental immunity doctrine and the Guest Statute barred the negligence claim.²⁶⁰

The Indiana Court of Appeals reversed, holding that parental immunity does not apply to a stepparent, at least not under these circumstances. Initially, the court noted that the parental immunity doctrine, although it has received criticism and has been eroded by numerous exceptions in many jurisdictions, still bars claims based on negligent acts by a custodial parent or by a non-custodial parent with joint custody.²⁶¹ In rejecting immunity in this context, the court reasoned that it makes sense to provide some immunity to parents because they have a legal obligation to support their children and are also obligated to exercise control, discipline, and responsibility over their children. However, that reasoning does not necessarily extend to stepparents.²⁶² The court stated that “in order to benefit from the parental immunity doctrine, a stepparent must take the formal step of becoming ‘invested with the rights and charged with the duties of a parent.’”²⁶³ In other words, the stepparent must take some action such as adopting the stepchild. Here, although Brabant had voluntarily provided financial support for his stepson, he had not adopted him so parental immunity did not apply. The court also held that parental immunity would not apply under these circumstances for the additional reason that Brabant was engaged in a business activity as Republic’s employee at the time of the accident.²⁶⁴

XII. CLASS ACTIONS

The class action, although obviously used in contexts other than torts, is significant in the torts context and continues to undergo substantial change. Rule 23 of the Federal Rules of Civil Procedure was modified effective December 1, 2003,²⁶⁵ affecting subsections (c), (e), (g) and (h). The Amendment addressed five significant areas: (1) timing for class certification; (2) notice provisions; (3) process for reviewing class action settlements; (4) criteria for the appointment of class counsel; and (5) procedure for setting attorney fee awards.

A. *The Timing of Class Certification*

Under the old Rule 23(c), the court was required to determine whether to

260. *Id.* at 201-02.

261. *Id.* at 206.

262. *Id.*

263. *Id.* at 207 (quoting *Treschman v. Treschman*, 61 N.E. 961, 962 (Ind. App. 1901)).

264. *Id.*

265. FED. R. CIV. P. 23(c)(1)(A). Additional changes in the class action context became effective February 18, 2005, as part of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. Although these amendments are beyond the scope of this survey Article, the class action practitioner should review these changes before filing or responding to any new class action matter.

certify a class “as soon as practicable after the commencement of an action.”²⁶⁶ The 2003 amendment replaces this language with a requirement that the determination be made “at an early practicable time.”²⁶⁷ This change reflected both prevailing practice and the “many valid reasons that may justify deferring the initial class certification decision.”²⁶⁸ Although this change recognizes that collection of information may be necessary before a class certification decision can be made, the commentary acknowledges that evaluation of the merits is not properly part of the certification decision. Rather, active judicial supervision should be used to achieve an effective balance that “expedites an informed certification determination without forcing an artificial and ultimately wasteful division between ‘certification discovery’ and ‘merits discovery.’”²⁶⁹ Other considerations in making this change included time needed to explore designation of class counsel under Rule 23(g) or the desire to resolve certain legal issues as to individuals before expanding the case to the class.

An additional change to Rule 23(c) eliminates “conditional” class certification. The commentary states that if a court “is not satisfied that the requirements of Rule 23 have been met [it] should refuse certification until they have been met.”²⁷⁰ The rule is also amended to set the cut-off point for alteration or amendment of an order granting or denying class certification to be at “final judgment” rather than at “the decision on the merits.”²⁷¹ The commentary indicates this is intended to avoid ambiguity. This final judgment “is not the same as the concept used for appeal purposes, but it should be, particularly in protracted litigation.”²⁷²

B. Notice Provisions

Rule 23(c)(2) was amended to call attention to the court’s authority to “direct notice of certification to a Rule 23(b)(1) or (b)(2) class,” where the old rule required notice only to actions certified under Rule 23(b)(3).²⁷³ Although the amendment allows a court to direct notice for (b)(1) or (b)(2) classes, the comments note that this authority “should be exercised with care,” especially where the characteristics of the class reduce the need for formal notice.²⁷⁴ The comments suggest the court balance the risk that notice costs may deter the pursuit of class relief against the benefits of notice and act with discretion and flexibility when notice is directed. The comments open the possibilities of notice to “informal” methods that might prove effective, such as a “simple posting in a

266. FED. R. CIV. P. 23(c)(1) (2002) (revised 2003).

267. FED. R. CIV. P. 23(c)(1)(A) (current).

268. FED. R. CIV. P. 23 advisory committee’s note.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

place visited by many class members, directing attention to a source of more detailed information.”²⁷⁵

C. Review of Class Action Settlements

Rule 23(e) was amended to strengthen the process of reviewing proposed class action settlements. First, the amendment expressly recognizes the power of a class representative to settle claims, issues, or defenses on behalf of the class.²⁷⁶ Second, the new rule requires court approval of individual settlements by putative class representatives only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.²⁷⁷ When a putative class has not been certified, the court may impose terms that protect potential class members who may have relied upon the class allegation, including directing notice to the putative class. Notice is required when the settlement binds the class through claim or issue preclusion, but is not required when the settlement binds only the individual class representatives.

Other changes to Rule 23(e) require individual notice if class members are required to take action—such as by filing a claim—in order to participate in the judgment or if the court orders a settlement opt out under Rule 23(e)(3).²⁷⁸ The changes also confirm and mandate the “already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.”²⁷⁹ In addition, the rule now provides the standard for approving a proposed settlement that would bind class members: “fair, reasonable, and adequate.”²⁸⁰ The court must enter findings that support its conclusion in sufficient detail to explain to class members and appellate courts the factors that bear on applying the standard. The rule also requires a party seeking approval to file a statement identifying any agreement or understanding made in connection with the settlement. The concern this change reflects is the possibility that something unwritten impacts the terms of the settlement, for example “trading away possible advantages for the class in return for advantages for others.”²⁸¹ The court may direct the parties to provide a copy of any agreement or take appropriate action to restrict access where the details may raise confidentiality concerns that need to be addressed by the court.

Rule 23(e)(3) gives the court authority, within the court’s discretion, to refuse to approve a settlement unless it affords a new opportunity to “opt out” of

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* For a review of factors that “may deserve consideration,” the committee recommends *In re Prudential Insurance Co. of America Sales Practice Litigation*, 148 F.3d 283, 316-24 (3d Cir. 1998).

281. FED. R. CIV. P. 23 advisory committee’s note.

a previously certified class action at the point of settlement. This change implicitly recognizes the fact that individuals may not know enough (or care enough) to make a decision early on, but once settlement terms are known, a decision to remain in the class is likely to be more carefully considered and better informed.

Once a class has been certified, provisions of Rule 23(e)(4) allow any class member to object to a proposed settlement, voluntary dismissal or compromise, but only on his or her own behalf, not on behalf of other class members by way of another class action. Once an objection is entered, its withdrawal requires court approval.²⁸²

D. Appointment of Class Counsel

Subdivision (g) is a newly added section of Rule 23 and sets forth standards regarding appointment of class counsel. These changes recognize the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.²⁸³ The new rule requires the court to appoint class counsel if it certifies a class²⁸⁴ and requires counsel to fairly and adequately represent the interests of the class.²⁸⁵ The comments on this amendment note that this clarifies the responsibility to the class, rather than to the individual members of it. As part of this, the comments note that class representatives do not have an unfettered right to fire class counsel, nor can class representatives command class counsel to accept or reject a settlement proposal.²⁸⁶

The rule sets forth a procedure that should be followed in appointing class counsel, identifying certain things which a court *must* consider in appointing class counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class.²⁸⁷ It also *permits* the court to consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class²⁸⁸ and gives the court the power to direct counsel to provide information pertinent to its decision²⁸⁹ and to make other orders in connection with the appointment.²⁹⁰ The rule also allows a court to appoint interim class

282. FED. R. CIV. P. 23(e)(4).

283. FED. R. CIV. P. 23 advisory committee's note.

284. FED. R. CIV. P. 23(g)(1)(A).

285. FED. R. CIV. P. 23(g)(1)(B).

286. FED. R. CIV. P. 23 advisory committee's note.

287. FED. R. CIV. P. 23(g)(1)(c)(1).

288. FED. R. CIV. P. 23(g)(1)(C)(ii).

289. FED. R. CIV. P. 23(g)(1)(C)(iii).

290. FED. R. CIV. P. 23(g)(1)(C)(iv).

counsel to act on behalf of the class before certification.²⁹¹

E. Setting Attorney Fee Awards

Subdivision (h) to Rule 23 is also new. This provision addresses attorneys' fees and provides that a court "may award reasonable attorney fees and nontaxable costs authorized by law or by agreement."²⁹² A claim for attorneys' fees must be made by motion under Rule 54(d)(2) and notice of the motion must be served on all parties.²⁹³ Class members and parties from whom payment is sought may object to the motion,²⁹⁴ and the court *may* hold a hearing and *must* enter findings of fact and conclusions of law under Rule 52(a).²⁹⁵ The court may refer issues related to the amount of an award to a special master or magistrate judge.²⁹⁶

Notably, the rule does not create new grounds for an award of attorneys' fees. Rather, it provides a format for addressing attorneys' fees when they are authorized by law or by agreement between the parties. The rule also does not address whether the "lodestar" or percentage method of determining a fee is the preferable approach. In the comments to the rule, it is noted that, even in the absence of objections, the court bears responsibility to assure that the amount and mode of payment of attorneys' fees are fair and proper.²⁹⁷

291. FED. R. CIV. P. 23(g)(2)(A).

292. FED. R. CIV. P. 23(h).

293. FED. R. CIV. P. 23(h)(1).

294. FED. R. CIV. P. 23(h)(2).

295. FED. R. CIV. P. 23(h)(3).

296. FED. R. CIV. P. 23(h)(4).

297. FED. R. CIV. P. 23 advisory committee's note.

